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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 85

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., ET AL., PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 31, 1950.

CERTIORARI GRANTED DECEMBER 11, 1950.

SUPREME COURT OF THE UNITED STATES

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vs.

NATIONAL LABOR RELATIONS BOARD

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[fol. 1] IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 10943

NATIONAL LABOR RELATIONS BOARD,
Petitioner

vs.

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., and JACK HENDERSON, the business agent of LOCAL 74,
Respondents

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—Filed June 15, 1949

To the Honorable, the Judges of the United States Court of Appeals for the Sixth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. (1946 ed.), Supp. I, Secs. 151, *et seq.*), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against respondents, Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and Jack Henderson, the business agent of Local 74, Chattanooga, Tennessee, and their agents. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and Jack Henderson, individually and as agent for Local 74, United Brotherhood of Carpenters and [fol. 2] Joiners of America, A. F. of L., and Ira A. Watson Company, d/b/a Watson's Specialty Store, Case No. 10-CC-1."

In support of this petition the Board respectfully shows:

(1) Respondents are engaged in business in the State of Tennessee, within the judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on November 22, 1948, duly stated its findings of fact and conclusions of law, and issued an order directed to the respondents, and their agents. So much of the aforesaid order as relates to this proceeding provides as follows:

Order

Upon the basis of the entire record in this proceeding and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondents, Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and Jack Henderson, the business agent of Local 74, and their agents, shall:

1. Cease and desist from engaging in or inducing the members of Local 74 to engage in a strike or a concerted refusal in the course of their employment to perform services for any employer, where an object thereof is to require any employer or other person to cease doing business with Ira A. Watson, doing business as Watson's Specialty Store.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post in conspicuous places at the business office of Local 74, in the city of Chattanooga, Tennessee, copies of the notice attached to the Intermediate Re- [fol. 3] port as an appendix.[21] Copies of the notice, to be furnished by the Regional Director for the Tenth Region, shall after being duly signed by a representa-

[21] Said notice shall be, and it hereby is, amended by striking from the first paragraph thereof the words "The Recommendations of a Trial Examiner," and substituting in lieu thereof the words "A Decision and Order"; and by striking from the text the last four words reading "or enforced by a decree of a United States Court of Appeals, there shall be inserted before the words "A Decision and Order," the words, "A Decree of the United States Court of Appeals Enforcing."

tive of Local 74 and by Jack Henderson as business agent of said Local, be posted immediately upon receipt thereof and maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said posted notices are not altered, defaced, or covered by any other material;

(b) Notify the Regional Director for the Tenth Region in writing, within ten (10) days from the date of this Order, what steps the Respondents have taken to comply herewith.

(3) On November 22, 1948, the Board's Decision and Order was served upon respondents by sending a copy thereof postpaid, bearing Government frank, by registered mail, to respondents' counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon so much of the order made thereupon as set forth in paragraph (2) hereof, a decree en- [fol. 4] forcing in whole said order of the Board, and requiring respondents, and their agents to comply therewith.

National Labor Relations Board, By (s) A. Norman Somers, Assistant General Counsel.

Dated at Washington, D. C.,
this 13th day of June, 1949.

Appendix

Notice

To All Members of Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L.

Pursuant To

A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our members that:

> We will not engage in or induce or encourage the Members of Local 74 to engage in a strike or a concerted refusal in the course of their employment to perform any services, where an object thereof is to force or require the employer or other person to cease doing business with Ira A. Watson Company, doing business as Watson's Specialty Store, or any other person.

Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L.

Dated....., By.....

Business Agent of Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L.

This notice must remain posted for sixty (60) days from the date hereof, and must not be altered, defaced, or covered by any other material.

[fol. 5] District of Columbia, ss:

A. Norman Somers, being first duly sworn, states that he is Assistant General Counsel of the National Labor Relations Board, petitioner herein, and that he is authorized to and does make this verification in behalf of said Board; that he has read the following petition and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information and belief.

(s) A. Norman Somers, Assistant General Counsel.

Subscribed and sworn to before me this 13th day of June, 1949.

(seal) (s) Rose Mary Filipowicz, Notary Public, District of Columbia.

My commission expires March 15, 1953.

In United States Court of Appeals

Board's Designation of Portions of Transcript to be Printed—Filed June 15, 1949

Petitioner, National Labor Relations Board, hereby designates the following portions of the transcript of record on file herein to be contained in the printed record:

1. The Intermediate Report of the Trial Examiner.
2. Respondents' Exceptions to the Intermediate Report.
3. The Decision and Order of the Board herein sought to be enforced.
4. The following portions of the transcript of the evidence adduced before the Trial Examiner:

[fol. 6]

From		To	
Page	Line	Page	Line
59	15	66	15
66	24	67	10
69	16	69	19
71	10	75	24
76	3	84	20
86	16	87	4
89	4	91	1
93	12	99	8
99	21	100	14
101	12	101	22
133	12	133	22
135	4	136	18
137	14	137	23
138	13	143	13
145	8	145	19
147	11	155	9
163	19	163	20
171	2	171	11
186	11	189	11
191	10	191	17
192	10	193	7
195	25	196	13
214	10	220	7
221	16	222	20
223	14	226	25
227	12	229	2
229	14	231	9

From		To	
Page	Line	Page	Line
279	22	281	9
282	4	282	12
283	4	283	12
300	23	302	10
303	12	304	23
307	4	309	5
309	22	310	1
311	1	313	7
334	1	336	13
342	24	344	23
351	9	352	25
[fol. 7]			
422	6	422	20
445	3	462	5
466	20	467	6

5. Board Exhibits 2A, 2B, 2C, 2D, 3, 4.

June 13, 1949.

(s) A. Norman Somers, Assistant General Counsel, National Labor Relations Board.

IN UNITED STATES COURT OF APPEALS

DESIGNATION BY RESPONDENTS OF PORTIONS OF TRANSCRIPT TO BE PRINTED—Filed July 25, 1949

Respondents, Local Union 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and Jack Henderson, individually and as Agent for Local Union 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., hereby designate the following additional portions of the transcript of record on file herein to be added to the printed record:

1. The following additional portions of the transcript of the evidence adduced before the Trial Examiner:

From		To	
Page	Line	Page	Line
103	1	103	17
117	2	118	3
124	3	125	6

From		To	
Page	Line	Page	Line
129	10	129	15
129	25	130	9
131	10	132	10
132	18	132	19
[fol. 8]			
164	1	164	16
170	1	170	10
171	12	171	22
174	5	175	25
176	17	178	17
179	7	184	16
184	23	185	7
210	5	210	22
212	13	212	25
236	21	237	23
272	1	272	15
285	13	286	10
286	14	288	1
288	25	289	12
293	7	293	20
349	6	349	22
369	5	369	10
369	18	371	16
373	16	373	19
374	15	374	22
376	22	377	3
377	13	377	19
424	21	427	6
430	5	432	9
433	23	434	13
444	13	444	25
490	3	490	10
490	23	492	10
493	20	494	24
495	10	498	6
499	6	499	24
508	5	508	25

2. Board Exhibits IB, IE, IF and IG.

3. Respondents' Exhibits 2 and 3.

Dated: New York, N. Y.
July 19, 1949.

Charles H. Tuttle, Attorneys for Respondents.

[fol. 9] In United States Court of Appeals

Stipulations as to Exhibits—Filed July 27, 1949

It Is Hereby Stipulated and Agreed that the printing of Respondents' Exhibits 2 and 3 designated by the Respondents as part of the record to be printed is hereby dispensed with and that upon the argument of the appeal either party may refer to and submit the originals of said exhibits and copies thereof, with the same effect as if part of the printed record.

Dated: New York, N. Y.
July 19, 1949.

A. Norman Somers, Attorneys for Petitioner, Charles H. Tuttle, Attorney for Respondents.

Approved:
Xen Hicks, Chief Judge.

Before National Labor Relations Board

Certificate of the National Labor Relations Board—Signed June 13, 1949

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 203.87, Rules and Regulations of the National Labor Relations Board—Series 5, as amended (redesignated Section 102.87, 14 F. R. 78), hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, "In the Matter of Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and Jack Henderson, individually and as agent for Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L. and Ira A. Watson

Company, d/b/a Watson's Specialty Store," the same being known as Case No. 10-CC-1 before said Board, such [fol. 10] transcript including the pleadings, testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Copy of order designating J. J. Fitzpatrick, Trial Examiner for the National Labor Relations Board, dated October 13, 1947.

(2) Stenographic transcript of testimony taken before Trial Examiner Fitzpatrick on October 23, 24, and 25, 1947, together with all exhibits introduced in evidence.

(3) Copy of Chief Trial Examiner's telegram, dated November 13, 1947, granting all parties extension of time for filing briefs, pursuant to respondents' request.

(4) Copy of Chief Trial Examiner's telegram, dated November 21, 1947, granting all parties further extension of time for filing briefs, pursuant to respondents' request.

(5) Copy of Chief Trial Examiner's telegram, dated December 5, 1947, granting all parties still further extension of time for filing briefs, pursuant to respondents' request.

(6) Copy of Trial Examiner Fitzpatrick's Intermediate Report, dated December 29, 1947, (annexed to item 18 hereof); copy of order transferring case to the Board, dated December 30, 1947, together with copy of affidavit of service thereof.

(7) Copy of respondents' letter, dated January 5, 1948, requesting permission to argue orally before the Board.

(8) Copy of respondents' exceptions to the Intermediate Report, received January 14, 1948.

(9) Copy of Board Attorney's exceptions to the Intermediate Report, dated January 16, 1948.

(10) Copy of respondents' telegram, dated January 17, 1948, requesting extension of time in which to file brief in support of exceptions.

(11) Copy of Board's telegram, dated January 19, 1948, [fol. 11] granting all parties extension of time in which to file briefs in support of exceptions.

(12) Copy of notice of hearing for the purpose of oral argument, issued by the Board on June 23, 1948, together with copy of affidavit of service thereof.

(13) Copy of respondents' telegram, dated June 25, 1948, requesting adjournment of oral argument.

(14) Copy of Board's notice of postponement of hearing, dated June 29, 1948, together with copy of affidavit of service thereof.

(15) Copy of list of appearances at oral argument, dated July 15, 1948.

(16) Copy of General Counsel's motion for leave to present oral argument, dated July 19, 1948.

(17) Copy of Board's letter, dated July 19, 1948, denying General Counsel opportunity to file a supplementary brief and granting respondent leave to file a reply brief.

(18) Copy of decision and order issued by the National Labor Relations Board on November 22, 1948, with Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 13th day of June, 1949.

(Seal) Frank M. Kleiler, Executive Secretary, National Labor Relations Board.

[fol. 12]

BEFORE THE NATIONAL LABOR RELATIONS BOARD TRIAL EXAMINING DIVISION, WASHINGTON, D. C.

Case No. 10-CC-1

In the Matter of Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and Jack Henderson, individually and as agent for Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L. and Ira R. Watson Company, d/b/a Watson's Specialty Store

Intermediate Report—Dated December 29, 1947

Mr. John C. McRee, for the General Counsel.

Mr. Charles H. Tuttle and *Mr. Francis X. Ward*, of New York, N. Y., and *Mr. Herbert G. B. King*, of Chattanooga, Tenn., for Respondents.

Mr. James J. Griffis and *Mr. Jac Chambliss*, of Chattanooga, Tenn., for the Company.

STATEMENT OF THE CASE

Upon an amended charge filed on September 15, 1947, by Ira A. Watson Company, doing business as Watson's Specialty Store, of Chattanooga, Tennessee, herein referred to as Watson's, the General Counsel of the National Labor Relations Board, on behalf of the Board,[1] [fol. 13] issued a complaint dated September 26, 1947, against Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and Jack Henderson, individually and as agent for Local 74, herein jointly called the Respondents,[2] alleging that the Respondents had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (b), subsections (1) (A) and (4) (A), and Section 2, subsections (6) and (7) of the Labor Management Relations

[1] The General Counsel and his representative at the hearing will be referred to herein as the General Counsel; the National Labor Board as the Board.

[2] When individual reference is made to Local 74 it will be referred to as the Union, or Local 74.

Act,[3] herein called the Act. Copies of the complaint as well as notices of hearing thereon were duly served upon the Respondents and Watson's.

With respect to the unfair labor practices, the complaint, as amended at the hearing, alleges in substance: (1) that the Respondents, about March 1947, placed a

(2)

picket in front of Watson's place of business declaring that Watson's was unfair to the Union and employed non-union employees, although the Union did not represent any of Watson's employees; that such picketing continued on and after August 22[4] until about August 30, 1947, for the purpose and with the effect of restraining and coercing Watson's installation employees to join the Union; and (2) that about August 21, 1947, the Respondents ordered its union members employed on the residence of George D. Stanley to leave their employment because Watson's non-union installation employees were also working on the residence; that the concerted refusal thereafter of members of the Union, pursuant to the said order, to perform their work on the residence as aforesaid continued on and after August 22, 1947, and the Respondents have refused at all times since August 22, 1947, to permit union members to work on the Stanley residence; that by such [fol. 14] acts on and after August 22, 1947, the Respondents have engaged in, and have induced and encouraged employees of an employer to engage in, a concerted refusal in the course of their employment to perform services, an object thereof being to force or require said employer to cease doing business with Watson's.

Thereafter the Respondents filed a joint answer in part admitting and in part denying the allegations in the complaint, but denying that the Respondents had engaged in any unfair labor practices. The answer admits that

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[3] The National Labor Relations Act as amended by Public Law 101, Chapter 120, 80th Congress, First Session.

[4] The complaint actually alleged August 23 but the General Counsel's brief stated that the correct date should be August 22. In accordance with granting unopposed motion to conform the pleadings to the proof insofar as names or dates are concerned, the complaint is so amended.

the Respondents (1) placed a picket in front of Watson's place of business after Watson's refusal to execute a proposed closed-shop contract, but denies that the picketing was for the purpose of restraining and coercing Watson's employees to join the Union;[5] and, (2) that about August 21, 1947, members of the Union refused to continue to work with Watson's non-union men, and at that time Union Business Agent Henderson announced that union members would not thereafter work on the job alongside of non-union workers.

Pursuant to notice a hearing was held on October 23, 24, and 25, 1947, at Chattanooga, Tennessee, before J. J. Fitzpatrick, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The General Counsel, the Respondents, and Watson's were represented by counsel and participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues was afforded all parties.

At the opening of the hearing, the undersigned denied the following successive motions by the Respondents: (1) for a stay of proceedings because a petition for an injunction[6] against the Respondents was pending in the District Court of the United States, Southern Division, Eastern District, Tennessee; (2) to dismiss the complaint on the [fol. 15] grounds that the issues raised therein were moot; (3) to strike allegations in the complaint as to violations of Section 8 (b) (1) (A) on the ground of variance in the allegations in the charge and in the complaint; and (4) to strike all allegations in the complaint relative to picketing on the ground that the picketing alleged was protected by the First Amendment of the United States Constitution. At the conclusion of the Government's case, the undersigned denied the Respondents' renewed motion to dismiss on all the grounds previously stated and on the further

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[5] The answer as filed appears to deny that the picketing continued from August 23 to about August 30. Respondents' counsel, at the opening of the hearing, stated on the record that the picketing continued until about the end of August 1947.

[6] Under the provisions of Section 10 (L) of the Act.

(3)

ground that a *prima facie* case had not been established against the Respondents. The motion to dismiss was again renewed by the Respondents at the close of all the testimony, for all the reasons previously urged and upon the further grounds that there was no preponderance of evidence to support the unfair labor practice allegations and that there was a failure of proof that Watson's was engaged in commerce within the meaning of the Act. This last motion was taken under advisement and is disposed of as hereafter appears. At the conclusion of the hearing all parties waived oral argument but the Respondents and the General Counsel have since filed briefs with the undersigned.

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT [1]

I. The parties; question concerning jurisdiction

The Ira A. Watson Company is a corporation organized and existing by virtue of the laws of the State of Rhode Island, with principal office at Knoxville, Tennessee. It maintains and operates about 26 or 27 retail stores located in seven states of the Union, including Tennessee. In February 1947 Watson's discontinued its general retail store in Chattanooga, and about March of that year began the operation of "Watson's Specialty Store" for the [fol. 16] sale of floor and wall coverings, paints and venetian blinds, and the sale and installation of coverings for floors and walls—such as metal and linoleum coverings for walls, and asphalt tile, rubber tile, carpeting and linoleum for floors. In the course and conduct of its operation of this specialty store, which is the only store involved in this proceeding, Watson's for the period from March to September 1947, purchased goods valued at approximately $93,000, of which approximately 33 percent represented purchases shipped to Watson's at Chattanooga from states

[1] Unless otherwise appears, the findings herein are based upon credible and uncontroverted evidence.

other than the State of Tennessee; approximately 30 percent represented material purchased through local sources but which was manufactured outside the state and shipped to distributors in Tennessee; and approximately 35 percent represented stock received from the closed Chattanooga general store most of which stock originated outside Tennessee. During the same period Watson's sales and installation jobs amounted to approximately $100,000 of which about 8 percent represented sales and installations in states other than the State of Tennessee.

Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., is a craft union labor organization affiliated with the United Brotherhood of Carpenters and Joiners of America which in turn is an affiliate of the American Federation of Labor. The Local admits to membership carpenters and other craftsmen including those who perform work similar to that of Watson's installation employees. It has jurisdiction over member workmen in Chattanooga and the surrounding area including portions of the states of Georgia and Alabama. Jack Henderson during all the times material herein has been and is the business agent of Local 74.

The Respondents question the jurisdiction of the Board in this proceeding on the ground that Watson's is not engaged in commerce within the meaning of the Act, particularly because its volume of business is small. As above found, most of the material sold by Watson's comes to it directly or indirectly in interstate commerce from sources outside of Tennessee. Eight percent of its sales and installations are also outside the State of Tennessee. [fol. 17]

(4)

The Supreme Court of the nited States has held that the fact that the volume in interstate commerce is "relatively small" does not eliminate the jurisdiction of the Board; Congress set no restrictions upon the Board in that respect.[8] The Board's jurisdiction has been sustained where the out of state sales of a comparatively small

[8] *N. L. R. B.* v. *Fainblatt*, 306 U. S. 601, reversing 98 F. 2d 615 (C.C.A. 3) setting aside N.L.R.B. 864 and 4 N.L.R.B. 594.

business was as low as 1 percent of the total sales.[9] It is therefore found that the contentions of the Respondents in the above request are without merit, and that Watson's is and has been engaged in commerce within the meaning of the Act.

II. The unfair labor practices

A. *The facts*

As above found, for some years prior to February 1947, Watson's operated a general retail store in Chattanooga. About the year 1944 a department was added to the store for the sale and installation of wall and floor coverings. In February 1947 Watson's discontinued the Chattanooga general retail store and the next month began operating a specialty store devoted exclusively to the sale and installation of wall and floor coverings. About the time the specialty store was opened, Henderson, as business agent for Local 74, sought unsuccessfully to persuade Watson's installation employees to join the Union. A few days later, Henderson requested A. D. Smith, manager of the specialty store, to execute a closed shop contract with Local 74 as the bargaining agent of the installation employees.

Smith refused to execute the contract, and in the latter part of March the Respondents placed a picket in front of the specialty store during business hours carrying a placard which announced, over the name of Local 74, that Watson's was "unfair to organized labor." This picket-[fol. 18] ing continued until about August 28, 1947.[10] The alternating pickets who carried the placard were not employees of Watson's.[11]

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[9] *N.L.R.B.* v. *Suburban Lumber Company*, 121 F. 2d 829 (C.C.A. 3) cert. den. 314 U. S. 693.

[10] In July, as the result of an action in a state court brought by Watson's against Local 74, the legend on the placard was changed to read, "This store employs non-union labor."

[11] About the time when the picket first appeared in front of the store Local 74 reported the facts to the Central Labor Union (an organization made up of representatives of locals of most of the A. F. of L. unions in the Chattanooga

On or about August 7, while the picketing above described continued, George D. Stanley, who had recently purchased an old home about eight miles out from Chattanooga, contracted with D. F. Parker to improve and renovate the house before occupancy by the Stanley

(5)

family. Under the terms of the agreement Parker was to furnish and supervise necessary workmen and to select material needed for the improvements. Stanley was to pay the wages of the workmen, the cost of necessary material, and a commission of ten percent of the cost of both to Parker. He also agreed to turn over to Parker withholding taxes, social security deductions, and other items deducted from the wages of the workmen. The contract provided that the remodeling of the property should be completed not later than August 15, 1947, and also contained a provision that either party could terminate the contract by giving the other party "twenty-four hours written notice of his intentions" to terminate, in which [fol. 19] event Parker was to be paid ten percent of the

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area) and asked that Watson's be placed on the "unfair" list. The record does not disclose whether Watson's was ever actually placed on such list by the Central Labor Union, but beginning in about July and continuing until well into October 1947, Local 74 ran advertisements in the "Labor World" (a weekly newspaper owned by the Central Labor Union which was sent to all AFL union members in the Chattanooga area, and a few subscribers, but which was not sold to the general public) naming local firms who employed members of Local 74 for installation work, and stating that Watson's employed non-union labor for this type of work. At the bottom of the advertisement which started in September appeared the statement, "Do not be deceived by Watson's claim that this statement is not part of our craft." Business Agent Henderson's testimony is credited with this statement appeared in the advertisement because a sign was displayed in Watson's window to the effect that laying linoleum was not work of a carpenter.

cost of the material and labor on the job up to that time.[12]

Pursuant to the terms of this agreement, Parker hired the necessary workmen, including members of Local 74 to do the carpentry work,[13] secured such material as was indicated and proceeded to renovate and improve the building in accordance with the specifications. In the course of the renovating, it became necessary to select floor and wall coverings for the house and neither Parker nor Stanley were able to find the type of coverings satisfactory to Stanley at any establishment in Chattanooga except Watson's, and Watson's insisted on installing the coverings it sold.

Parker and Stanley discussed the complications that might arise with the union employees if Watson's non-union workmen installed the coverings, and, at Parker's suggestion, it was agreed that Watson's men should do their work at hours when the union men were off duty. Whereupon Stanley, with Parker's implied consent, made a special contract with Watson's for the purchase and installation of the floor and wall coverings.[14] The installa-

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[12] It will be noted that while Parker selected the workmen, Stanley paid them for their services. Stanley had the least say apparently relative to other provisions of the agreement as hereafter appears. For our purposes therefore it is assumed that Stanley was the actual employer.

[13] Parker was a member of Local 74, and all the workmen, besides the carpenters, employed by him on the job were union men.

[14] This contract is in the form of a letter dated August 15 to Stanley from Watson's and later approved by Stanley, the body of which reads as follows:

> We propose to furnish and install rubber tile and cove- base in your kitchen and three bathrooms for the sum of $376, which includes sanding and removing old linoleum.
>
> We will furnish and install chromite wall coverings in kitchen and two bath 4 ft. high for the sum of $400.
>
> It will be necessary for the walls to be a good, dry, smooth, plaster before we apply wall covering.
>
> In case you decide to have the third bath included for wall coverings you may add $99 to above figures."

tion work, estimated to take a week, was started on Sunday, August 17 when there were no other work men present. However, on Monday and Tuesday, apparently with Parker's approval, the installation continued during the regular working hours. On Wednesday, August 20, two of the carpenters stopped work for about half an hour [fol. 20] because of the presence on the job of the non-union installation workers.[15] Parker was able to smooth over this difficulty and the carpenters involved returned to their work and finished the day. However, on the morning of

(6)

August 21, when Installation Employee Pozzuto [16] reported for work, Parker told him that he could not work that day as the union men were threatening to quit, and requested that he complete the installation at night or at periods when the union men were not working. Pozzuto refused to work after hours, whereupon Parker telephoned Watson's Manager Smith that there might be trouble and, at his suggestion, Smith took Pozzuto off the Stanley job for the time being.

The situation existing at the Stanley residence came to the attention of Local 74 and, in spite of this precaution on the part of Parker, the same afternoon of August 21, Business Agent Henderson appeared at the Stanley place and told the four union carpenters then working on the job that they could not continue to work with non-union men, or where non-union men were employed.[17] This order of the Businesss Agent has not since been rescinded, nor has it been repudiated in any way by Local 74.

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[15] Local 74 admitted to membership, and actually had members who did the type of installation work performed by Watson's workers.

[16] One of the two installation men employed by Watson's on this job. The other man apparently did not report for work that day.

[17] At the time this order was given by Henderson there were no Watson's men actually working on the job but the installation work had not been completed. The only workers employed on the job at this time apparently, other than the installers, were the four members of the Union above referred to.

After Henderson had issued the above instructions, Stanley, who had arrived at the house about the same time, sought unsuccessfully to have the business agent countermand his instructions. Henderson then left the scene. The union carpenters completed their days' work [18] [fol. 21] but did not return to work on the following days, in compliance with the instructions issued by the Respondents. On August 22nd Parker telephoned Watson's that the installation work could be resumed. Two or three days later Watson's men returned to the job and completed their work about August 28. In fact all the renovating of the Stanley house was completed on or about the end of August, the unfinished carpentry being completed by two of the four union men who had been on the job (at the

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[18] Stanley testified that the men left their work "in about an hour after (Henderson) left." As Henderson arrived at the Stanley residence about the middle of the afternoon on August 21, and the men only worked until 4:30 this testimony of his does not necessarily conflict with other testimony in the record, which the undersigned accepts, that the carpenters completed their days work on August 21. The only specific testimony that the carpenters dropped their tools and left their work on the 21st when the Henderson order was issued is that of Union Recording Secretary Rose, who accompanied Henderson to the Stanley residence. Rose first testified that he did not hear what Henderson told the union men. Later in his testimony when again asked if he was present when Henderson told the carpenters to "pack their tools and get off the job," he answered, "He just told them that they couldn't work there with non-union men, and the men quit—the men quit work when he told them they couldn't work there—." This testimony of Rose's is rejected because of inconsistencies, and insofar as it is in apparent conflict with the credited testimony of Henderson that the men did not leave their work until after Henderson left the Stanley residence.

urgent request of Parker), but without the knowledge or consent of the Respondents.[19]

Business Agent Henderson testified credibly that it was and had been for many years the practice of Local 74 not to permit their union members to work on a job where non-union workers were employed; that, in this instance, Local 74 ordered the work stoppage of its members when it learned that non-union employees of Watson's were also working on the Stanley residence; and that it would have been a violation of the rules of the Union for the carpenters to have returned to that particular job on August 22 or thereafter.[20]

[fol. 22] (7)

B. Conclusions

(1) The picketing

It is alleged in the complaint and contended by the General Counsel that the picketing of Watson's by Local 74 on and after August 22, 1946 (The effective date of the amendment of the Act)[21] constituted a violation of Section 8 (b) (1) (A) of the Act. The Respondents argue (a) that the picketing was peaceful and in no way constituted a viola-

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[19] Parker so testified, and his testimony in that respect is credited. Stanley testified that the renovating of his house was never entirely completed, but he also testified on cross-examination:

Q. Who finished the job, the house?

A. Different people.

[20] Henderson's testimony is also credited that in his capacity as business agent for the Union he was not asked at any time after August 21 by either Stanley or Parker to order the union carpenters to return to the Stanley job, but that if he had been so requested he could not have ordered the men to return without a special dispensation from Local 74.

[21] Section 104 of the Act provides that the amendments thereto shall take effect "sixty days after the date of the enactment of this Act,—." The Labor Management Act became law on June 23, 1947.

tion of the Act and (b) in any event it was an exercise on the part of the Respondents on their right to free expression of opinion and is fully protected by the First Amendment to the Constitution of the United States.

Realistically, it must be accepted that the picketing of Watson's by Local 74 both before and after August 22 was part and parcel of a campaign by the Respondents to unionize Watson's installation employees. Business Agent Henderson first appealed directly to the installation employees to become union members, but without any success. He then sought to bypass the employees' lack of union enthusiasm by getting Watson to agree to employ only union installers. When this contract maneuver also proved futile,[22] the Respondents by means of a picket parading in front of the Specialty Store during business hours advertised that Watson's employed non-union workers. They published this fact also in the Labor World, and in that periodical named the competitors of Watson's who did employ union help. Although Henderson testified that the picketing was not for the purpose of inducing Watson's employees to join the Union, he also testified that this method of advertising Watson's was resorted to because Local 74 considered it "unfair" for non-union employees to work "with union men where we have had the work organized [fol. 23] for ten years." The only reasonable inference that can be drawn from this testimony of the business agent of Local 74, and from the method of picketing and other means employed to publicize where union men worked and where competing non-union workers were employed, is that such technique was used in the hope that eventually it would result in the unionization of the installation employees of Watson's, the only non-union employer under attack. It is therefore found that the picketing of Watson's by Local 74 heretofore described was for the purpose of inducing, directly or indirectly, the workers who installed the wall and floor coverings sold by Watson to join the Union.

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[22] There is no allegation in the complaint that this effort on the part of Local 74 to secure a closed-shop agreement constituted a violation of Section 8 (b) (3) of the Act, and no finding in that respect is made herein.

The General Counsel's brief, however, insists that the picketing was "economic coercion" "to force" Watson's employees to join the Union. The placard stated an undisputed fact, that Watson's employed non-union help.[23] One picket only carried the sign in front of the store. There was no attempt by force or otherwise to keep customers out of the store or to interfere in any manner with the employees on their way to or from work. The results sought by the picketing was stated by Business Agent Henderson at pages 281-2 of the record, as follows:

(8)

Q. (By Mr. King): What was the purpose of your Union picketing Watson's, the charging party herein?

A. Well, because—to notify our friends that they were non-union.

Q. Well, what was the ultimate purpose of notifying that they were non-union? What results did you expect to get from that?

A. We expected our friends not to patronize them.

That this expected result was obtained can be inferred from the record.[24] It is assumed, also, that at least some [fol. 24] of the installation employees, aware that the advertising was having an adverse effect on the business of their employer, considered the economic advantage of join-

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[23] Although the earlier placard stated that Watson's was unfair to Local 74, this legend as heretofore found was changed before the effective date of the Act to read as above stated.

[24] There was no direct testimony of loss of business by Watson's as a result of the picketing. However, Business Agent Henderson testified that in the summer of 1947 Watson's in a State court sought an injunction to prohibit the Union "from creating the breach of existing contracts"; and a copy of the modified decree issued by the State court was received in evidence for the purpose only of explaining this testimony of Henderson. The State court decree finds as a fact that the "Union and its representatives have procured the breach of valid and existing contracts between (Watson's) and third parties—."

ing the Union. This is not to say that, because the picketing brought some results in loss of business to the employer, it follows that the employees, in order to protect their jobs, were forced to join the Union, especially where no threats were involved. In the case before us it is noted that it actually had no such effect, as there is no evidence that any of Watson's employees joined the Union. The most that can be said in that respect is that the picketing was intended to demonstrate to the non-union workers that it was to their advantage to become union members. It did not constitute restraint or coercion of those employees in the exercise of rights guaranteed under the Act, nor did it have that effect.

The legislative history of the amendment to the Wagner Act with which we are here concerned shows that the Congress intended to prohibit the use by unions in organizational efforts of "goon squads," threats of violence as well as other types of threats, and mass picketing; that it sought to make unions liable for the same type of restraint and coercion against employees that would be an unfair labor practice if used by employers against employees. Thus Senator Taft stated in Vol. 93 Cong. Rec. at p. 4142:

> An employer cannot go to an employee and say, "If you join this union you will be discharged." He cannot go to an employee and threaten physical violence. He cannot employ police to accomplish that purpose. Now it is proposed that the union be bound in the same way. What could be more reasonable than that? Why should a union be able to go to an employee and threaten violence if he does not join the union? Why should a [fol. 25] union be able to say to an employee, "If you do not join this union we will see that you cannot work in this plant?" What possible distinction can there be between an unfair labor practice of that kind on the part of an employer and a similar practice on the part of a union? We know that such things have actually occurred.

(9)

and, at p. 4143:

> the moment that . . . a man is threatened with losing his job if he does not join, it at once becomes an unfair labor practice. Threats of coercion ought to become unfair labor practices on the part of a union.

That the Congress had no intention of interfering with the normal rights or either an employer or of a union to effectively present arguments and opinions involving labor matters is definitely established by the provisions of Section 8 (c) of the Act which states:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Prior to the enactment of the Labor Management Act of 1947, the courts, construing Section 8 (1) of the Wagner Act,[25] held that an anti-union statement of an employer to his employees, standing alone, even if made on the eve of a representation election, was protected fully by the First Amendment to the Constitution of the United States and did not constitute a violation of the statute if the [fol. 26] statement contained no threats of reprisal or promises of rewards.[26]

Section 8 (c), above quoted, established in statutory form decisional law already in existence eliminating as an unfair labor practice statements of opinions, or argument in any form, by an employer to his employees (provided it contained no threats or promises); and extended the doctrine to similar statements by unions.

The undersigned therefore finds that the picketing herein described constituted a method employed by the Respondent to persuade and induce the installation employees of Watson's to join the Union, and was not violative of the Act.

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[25] Sec. 8. It shall be unfair labor practice for an employer —(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. The exact wording appears in Section 8 (a) (1) of the Labor Management Act.

[26] *Virginia Electric and Power Company*, 314 U. S. 469; *American Tube & Piping Co.*, 134 F. 2d 993 (C.C.A. 2), cert. denied 320 U. S. 768.

(2) The concerted refusal to work

(a) As an alleged violation of Section 8 (b) (1) (A)

The complaint alleges that the concerted refusal on the part of the union members, acting under instructions from the Respondents, to work on the Stanley residence also had the effect of restraining and coercing Watson's installation employees to join Local 74, in violation of Section 8 (b) (1) (A) of the Act. The only reference in the General Counsel's brief in support of this allegation is a conclusion, appended to the argument that the picketing constituted a violation of this subsection, in the following language:

> It is also clear that the concerted refusal to work on the Stanley job had the effect of coercing and re-
>
> (10)
>
> straining Watson's installation employees to join the Union. Obviously, if the Union refused to allow its members to work on any job where Watson's non-union employees are employed, this is strong economic coercion to force Watson's employees to join the Union.

The concerted refusal to work, was contemporaneous with the picketing, and like the picketing, was part of the [fol. 27] Respondent's campaign to organize Watson's installation employees. As has been heretofore found, the picketing was a method employed by Local 74 to publicize the fact that Watson did not employ union labor, on the theory that some potential customers would not patronize such an establishment, and with the hope that such activity would induce the installation employees to join the Union; but that any such effect on said employees was persuasive and not coercive.

Did the refusal of the union carpenters to work on the Stanley residence, under the circumstances disclosed by the record, constitute an activity, the reasonable and intended effect of which was to coerce the installation employees to join the Union, within the meaning of the subsection cited; or was this merely another form of concerted activity intended, in part at least, to further demonstrate to the installation employees the economic advantage to themselves of joining the Union?

It seems to the undersigned that the question above propounded answers itself. There was no attempt to prevent Watson's employees from working on this or any other job. There was no picketing or any of the usual methods used to persuade employees not to work—simply a concerted refusal to continue working with the non-union workers, in accordance with long established union precedent. It is therefore found, consistent with the Respondents' contentions and in accordance with the reasoning in the preceding section hereof, that the concerted refusal of union employees to work on the Stanley residence, pursuant to instructions from the Respondents' did not constitute a violation of Section 8 (b) (1) (A) of the Act.

(b) As a violation of Section 8 (b) (4) (A)

Although it has been found above that the concerted refusal of the carpenters[27] to work on the Stanley job [fol. 28] did not coerce Watson's *employees* in the exercise of the rights guaranteed in Section 7 of the Act, a much more serious question arises as to whether their refusal to work, under the circumstances herein found, constituted a strike or boycott against an *employer* in violation of Section 8 (b) (4) (A) of the Act, as alleged in the complaint and argued by the General Counsel.

The subsection above referred to provides:

> Sec. 8 (b) it shall be an unfair labor practice for a labor organization or its agents—(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment . . . to perform any services, where an object thereof is: (A) forcing or requiring . . . any employer or other person . . . to cease doing business with any other person;

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[27] The term carpenters as used in this respect is a characterization only to indicate the four members of Local 74 who were employed on the Stanley residence. Actually, only two of them were doing the work of a carpenter, as that term is ordinarily construed. The other two members of the Union included were sanders.

(11)

It has been found that the picketing and the concerted refusal to work were for the purpose of inducing customers not to patronize the specialty store, in the hopes that thereby the installation employees would see the advantage to themselves of joining the Union. The refusal to work went one step further. It was aimed at and directly affected one particular employer customer of Watson's. Pursuant to the order issued by the union business agent, the carpenters concertedly quit working on the Stanley job because of the employment thereon of Watson's installation employees. In other words, the carpenters struck the job as a means of "forcing or requiring" Stanley to hire union installers. The only way Stanley could acquire union installers was by breaking his agreement with Watson's.

It is not disputed that a strike order, such as the above, issued by a union on or after August 22, 1947, would constitute a violation of the subsection, but the Respondents insist that the order to cease work was issued by Henderson and went into effect on August 21, before the effective date of subsection 8 (b) (4) (A). It is true that in discussions during the course of the hearing the at- [fol. 29] torneys on both sides as well as the Trial Examiner assumed that the evidence disclosed that the union carpenters quit work on August 21; but the record will not support this assumption. The only testimony in the record to the effect that the order became effective and the union men involved ceased work on August 21 is that of Stanley and Rose; and as heretofore found, that testimony, where not rejected as inconsistent, is reconcilable with other credited testimony herein. The remainder of the testimony in this respect, including that of the only two union carpenters who testified, clearly shows that the carpenters completed their day's work on August 21, and the strike started on the morning of the 22nd when the union men failed to report for work at the usual time. Even Henderson did not intend that the carpenters should forthwith pick up their tools and leave the job at the time he issued the order. After stating that he had instructed the union carpenters that they could not work with non-union men or where non-union men were employed, the union business agent testified further as follows:

> Q. Now, what took place then? Go ahead and state whether or not your men remained on the job or left the job.
>
> A. Well, when I left, they had not left the job, simply because you just can't quit a job all at once; I mean, you—you've got to—several things to do before you can leave a job, and I didn't stay there very long.

Any doubt as to whether the men completed their work on the day the order was issued is removed by Timekeeper Robert S. Freeman who testified that the carpenters worked "through to the evening of the 21st."

In further support of their contention that their activities concerning the strike occurred prior to August 22 the Respondents refer to the decision of United States District Judge Darr, who in dismissing the petition for a temporary injunction, brought under the provisions of Section 10 (L) of the Act, found as a fact that on August 21,

> [fol. 30] members of Local 74, acting under orders from Jack Henderson as Business Agent, concertedly left their employment at Stanley's residence and refused to perform services therein

and,

> I have reached the conclusion that the facts presented in the petition and by the affidavits do not come within

> the provisions of the Act because all the conduct upon which these facts are based occurred prior to the effect date of the Act.[28]

The Respondents insist that the above decision of Judge Darr is the law of the case and the Board cannot issue a cease and desist order under the circumstances. The matter was before the District Court for decision as to whether injunctive relief was proper "pending the final adjudication of the Board with respect to such matter."[29]

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[28] *Styles* v. *Local 74*, etc., 21 LRR 2010.

[29] Quoting from Section 10 (L) of the Act, above referred to.

Judge Darr's findings as to the facts were based entirely upon the allegations in the petition and in the affidavits filed with him. There was no examination and cross-examination of witnesses. While the supporting affidavits filed in the District Court are not available, the petition upon which the application for injunctive relief was primarily based is an exhibit in the instant hearing. Paragraph 7 (d) of this petition in part alleges that on August 21,

> the employees of the charging party, after working a short time were ordered off the job by Parker, acting under pressure by Local 74 and Henderson,—The same day, members of Local 74, acting under orders from Jack Henderson as Business Agent, concertedly left their employment at Stanley's residence and refused to perform services therein.

As above found, the record in the instant case, based upon the testimony of witnesses who were subject to cross-[fol. 31] examination, shows conclusively that, while the order to cease work was issued on August 21 there was no attempt to put it into immediate effect, and in fact the union members affected completed their work for that day, but did not report for work on August 22 or thereafter. With all due deference to the findings of Judge Darr, it is clear that the facts as presented to him in the injunctive hearing are not identical with the evidence as testified to by witnesses in the present proceeding, particularly with reference to the time when the union men left the Stanley job. Furthermore, findings and conclusions on a petition for a temporary injunction pending the ultimate decision of the main case on the merits are, on their face and in fact, limited in their application and effect to the granting of the temporary relief sought. They do not go to the merits of the controversy. The merits are determined in a later hearing before an authorized tribunal based upon the testimony of sworn witnesses subject to cross-examination. In this type of case the tribunal exclusively authorized to try the case on the merits is the National Labor Relations Board.[30]

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[30] That Judge Darr fully recognized the limited nature of the proceeding before him appears from the following ex-

The contentions of the Respondents that the findings and decision of the United States District Judge in the injunctive proceedings establish and settle the issues in the instant proceeding are therefore rejected.

It is found that the order to cease work issued by Business Agent Henderson on the afternoon of August 21, did not take effect and was not intended to take effect until the beginning of the next succeeding working day, to-wit: August 22, 1947.

(13)

Even if it be assumed, contrary to the finding herein, that the concerted refusal to work, or the strike, was not only called on August 21, but that it actually became effective on that date, the ultimate result would be no different [fol. 32] because the strike so ordered continued on and after August 22. A strike once started continues until it is either called off, or is broken and abandoned. In this instance presumably the strike was abandoned about the end of August, because the struck job had been completed in spite of the Union. In the meanwhile, the strike had been going on, of which fact Local 74 was officially advised on the evening of August 22 at a regular meeting. Nevertheless, although the Respondent had knowledge that the amendment to the act had gone into effect, they took no action then or later to rescind the strike order. The Respondents like any organization or person must accept responsibility for the anticipated result of their activity. The anticipated result in this instance being that, as a result of the order issued August 21 by the Respondents, the Stanley job remained struck on August 22nd and for some time thereafter.

It is therefore found that the strike order issued by the Respondents caused the union carpenters to strike and to refuse concertedly to continue with their work on the Stanley residence an object thereof being to require

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cerpts of his decision: "The only jurisdiction in this court is for injunctive relief pending the hearing and decision by the National Labor Relations Board. The determination of any of the issues by this court are, therefore, of small significance as concerning the ultimate adjustment of the controversy."

Stanley to cease doing business with Watson's in violation of Section 8 (b) (4) (A) of the Act.[31]

[fol. 33] (3) Constitutional questions

In view of the finding hereinabove that there has been no violation of Section 8 (b) (1) (A) of the Act, it is unnecessary herein to pass on the contention of the Respondents that the picketing of Watson's, as a form of free speech, was a protected activity under the guarantees of the First Amendment of the United States Constitution. No constitutional question was raised at the hearing or in the briefs filed relative to the strike. However, the Respondents' answer to the petition for injunctive relief filed in the United States District Court (involving the identical facts herein treated and which answer

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[31] The Respondents also contend that the concerted refusal to work was brought about because Stanley and Watson's entered into what amounted to a conspiracy whereby Watson's products were not only purchased but they were ordered installed by non-union men on what had previously been a union job; and that if Stanley had purchased the material from Watson's but had permitted union men to install it, there would have been no trouble. This argument is largely negatived by the fact that, contemporaneously with the strike, there was a picket in front of Watson's placed there for the purpose, as herein found, of inducing the public not to patronize Watson's. It is true that Stanley had a contract with Parker to remodel the residence, including the selection of materials. But when it developed that the type of wall and floor coverings sought could only be obtained from Watson's (who would not sell unless it could also install them), Stanley made the deal with Watson's with the knowledge and at least acquiescence of Parker. It was, under the circumstances, a legitimate modification of the previously existing agreement for the renovation of the Stanley home. Whether it was the purpose or not, the effect of this supplemental agreement between Stanley and Watson's was to interfere with the union control of the labor supply on the job, and emphasizes that the strike was in protest against such interference.

was by reference made a part of the Respondents' answer in the instant proceedings) alleges in part as follows:

> —if the alleged facts in the petition constitute a violation of Section 8 (b), subsection (4) (A) of the National Labor Relations Act as amended June 23, 1947, such statute affords no lawful basis for the petition, because such statute, or at least its applica-
>
> (14)
>
> tion to the alleged facts set forth in the petition, is unconstitutional and in violation of the First, Fifth, Tenth and Thirteenth Amendments to the Constitution of the United States, as abridging the freedom of speech, as depriving the respondents of liberty and property without due process of law, as exercising power not delegated to the United States by the Constitution, and as imposing involuntary servitude in a case where punishment for crime is not involved.

It will therefore be assumed that the above constitutional questions have been raised by the Respondents relative to Section 8 (b) (4) (A) and its application to the strike herein discussed. However, the Board is an administrative agency of the Federal Government and it is inappropriate for the Board to pass upon questions regarding the constitutionality of Congressional enactments. As the Board stated recently in the *Rite-Form Corset* case:[32]

> [fol. 34] Such questions will be left to the courts. In the absence of any court decision to the contrary, the Board assumes that the Act as amended does not violate any provision of the Constitution of the United States, as alleged by the petitioner.

As no court has had an opportunity as yet to pass upon the constitutionality of Section 8 (b) (4) (A) the undersigned, in conformity and in agreement with Board precedent, will assume its constitutionality and not pass on the constitutional questions raised herein.

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[32] In the *Matter of Rite-Form Corset Company, Inc.*, and *United Steel Workers of America, C. I. O.*, 75 N.L.R.B., No. 19.

III. The effect of the unfair labor practices upon commerce

The activities of the Respondents as set forth in Section II above, occurring in connection with the operations of Watson's described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IV. The remedy

It has been found that the Respondents have engaged in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act. Although the strike on the Stanley residence, ordered by the Respondents, has presumably ceased, dut to the fact that the renovating of the house has been completed, there is a possibility, if not a probability, that similar acts may be repeated in the future by the Respondents.[33] It will therefore be recommended that the Respondents cease and desist from engaging in or inducing or encouraging its members to engage in a concerted refusal in the course of their employment to perform services for an employer, where an object thereof is to force or induce the employer, or any [fol. 35] other person, to cease doing business with a third person. It will be further recommended that the Respondents take certain affirmative action to effectuate the policies of tl Act.

Upon the basis of the above findings of fact, and upon the entire record in the case, the undersigned makes the following:

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[33] Business Agent Henderson testified that under the rules of Local 74 none of its members are permitted to work on any job where part of the job is being done by non-union labor—even though the non-union labor did not come under the jurisdiction of Local 74.

(15)

Conclusions of Law

1. The Ira A. Watson Company, doing business under the trade name and style of Watson's Specialty Store, is engaged in commerce within the meaning of Section 2, subsections (6) and (7) of the Act.

2. Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., is a labor organization within the meaning of Section 2, subsection (5) of the Act. Jack Henderson is the Business Agent of Local 74.

3. By inducing or encouraging members of Local 74 to engage in a strike, or concerted refusal in the course of their employment to work on the Stanley residence, where an object thereof is to force or require Stanley to cease doing business with Watson's Specialty Store, Local 74, International Brotherhood of Carpenters and Joiners of America, A. F. of L., and Jack Henderson as its business agent, have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (b) (4) (A) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

5. Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and Jack Henderson, its business agent, have not engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

Recommendations

Upon the basis of the above findings of fact and conclusions of law, the undersigned hereby recommends that [fol. 36] the Respondents Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and Jack Henderson the business agent of said Local, their agents, successors, and assigns, shall:

1. Cease and desist from engaging in or inducing the members of Local 74 to engage in a strike or a concerted refusal in the course of their employment to perform services for any employer, where an object thereof is to require any employer or other person to cease doing business with Ira A. Watson Company, doing business as Watson's Specialty Store, or other person.

2. Take the following affirmative action, which the undersigned finds will effectuate the policies of the Act:

(a) Post in a conspicuous place at the business office of Local 74 in the City of Chattanooga, Tennessee, where notices to members are ordinarily posted, a copy of the notice attached hereto as an appendix, and give copies thereof to each member of Local 74, or mail copies to the last known address of each member by registered mail. Copies of the notice to be furnished by the Regional Director for the Tenth Region shall, after being signed by a representative of Local 74 and by Jack Henderson as business agent for said Local, be immediately given to members, or mailed to each of them, as aforesaid, and the copy immediately posted and maintained for a period of sixty days thereafter. Reasonable steps shall be taken by the Respondents to insure that the posted notice is not altered, defaced, or covered by other material;

(b) Notify the Regional Director for the Tenth Region in writing within ten (10) days from the receipt of this Intermediate Report what steps the Respondents have taken to comply herewith.

It is further recommended that, unless the Respondent shall within ten (10) days from the receipt of this Intermediate Report notify said Regional Director in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondents to take the action aforesaid.

[fol. 37] It is also recommended that the complaint be dismissed insofar as it alleges a violation by the Respondents of Section 8 (b) (1) (A) of the Act.

As provided in Section 203.46 of the Rules and Regulations of the National Labor Relations Board, Series 5, effective August 22, 1947, any party may, within twenty (20) days from the date of service of the order transferring the case to the Board, pursuant to Section 203.45 of said Rules and Regulations, file with the Board, Rochambeau Building, Washington 25, D. C., an original and six copies of a statement in writing setting forth such exceptions to the Intermediate Report and Recommended Order or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon,

together with the original and six copies of a brief in support thereof; and any party may, within the same period, file an original and six copies of a brief in support of the Intermediate Report and Recommended Order. Immediately upon the filing of such statement of exceptions and/or briefs, the party filing the same shall serve a copy thereof upon each of the other parties. Proof of service on the other parties of all papers filed with the Board shall be promptly made as required by Section 203.85. As further provided in said Section 203.46, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of service of the order transferring the case to the Board.

In the event no Statement of Exceptions is filed as provided by the aforesaid Rules and Regulations, the findings, conclusions, recommendations, and recommended order herein contained shall, as provided in Section 203.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions and order, and all objections and exceptions thereto shall be deemed waived for all purposes.

J. J. Fitzpatrick, Trial Examiner.

Dated: December 29, 1947.

[fol. 38]

Appendix

Notice

To All Members of Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L. Pursuant To

The Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our members that:

We will not engage in or induce or encourage the members of Local 74 to engage in a strike or a concerted refusal in the course of their employment to perform any services, where an object thereof is to force or require the employer or other person to cease

doing business with Ira A. Watson Company, doing business as Watson's Specialty Store, or any other person.

Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L.

Dated..... By.....
(Title of office)

.....
Business Agent of Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L.

This notice must remain posted for sixty (60) days from the date hereof, and must not be altered, defaced, or covered by any other material.

[fol. 39] BEFORE NATIONAL LABOR RELATIONS BOARD

RESPONDENTS' EXCEPTIONS TO INTERMEDIATE REPORT—Dated January 12, 1948

Respondents herein respectfully and severally except to each of Findings of Fact I, II A, II B(2) (b), II B(3), III, IV; Conclusions of Law 1, 3, 4; and Recommendations 1, 2(a) (b), on the grounds that the foregoing are not based upon the facts in the record, are contrary to the facts contained in the record, are not supported by the evidence on the record considered as a whole, are not in accordance with law, and are contrary to law, and as more fully set forth herein in the specific exceptions below.

Respondents also respectfully and severally except to the refusal or failure to make Findings, Conclusions and Recommendations as more specifically set forth hereinbelow.

Findings of Fact

"I. The parties; question concerning jurisdiction"

1. Respondents except to the Findings of the Trial Examiner with respect to the question concerning jurisdic-

tion, and to the Finding that Watson's is and has been engaged in commerce within the meaning of the Labor Management Relations Act, 1947, herein referred to as the Act (p. 4, l. 6-9.)

2. Respondents except to the Finding, express or implied, that the work at Stanley's residence was commerce or affected commerce within the meaning of the Act (p. 4, l. 6-9.)

3. Respondents except to the Finding, express or implied, that the withdrawal of members of Local 74 from work at Stanley's residence was a labor dispute affecting commerce within the meaning of the Act (p. 4, l. 6-9).

4. Respondents except to the Finding, express or implied, that the material purchased by Stanley for installation in his residence was at the time of such purchase in commerce within the meaning of the Act (p. 4, l. 6-9).

[fol. 40] Failures or Refusals to Find

5. Respondents except to the failure or refusal of the Trial Examiner to find as matter of fact and/or conclusion of law (a) that the aforesaid material was not at the time of its said purchase in commerce and/or (b) that the said work at Stanley's residence was not commerce or affecting commerce, and/or (c) that the aforesaid withdrawal by members of Local 74 was not a labor dispute affecting commerce,—within the meaning of the Act (p. 3, l. 20-60; p. 4, l. 1-9).

6. Respondents except to the failure or refusal of the Trial Examiner to find as a matter of fact and/or conclusion of law that the work at Stanley's residence in the placing of floor and wall coverings was essentially of such local character that the policies of the Act will not be effectuated by asserting jurisdiction in this case.

7. Respondents except to the failure or refusal of the Trial Examiner to find as a matter of fact and/or conclusion of law that Stanley's purchase aforesaid was of such essentially local character that the policies of the Act will not be effectuated by asserting jurisdiction in this case.

"II. The unfair labor practices"

"A. *The Facts*"

8. Respondents except to the Findings of the Trial Examiner that Stanley was the actual employer (p. 5, l. 11; footnote 12, l. 36-40).

9. Respondents except to the Finding of the Trial Examiner that the Union carpenters completed their day's work on August 21, 1947 (p. 6, l. 15), and to footnote 18 that the carpenters completed their day's work on that day (p. 6, l. 36-51).

"B. *Conclusions*"

"(2) The concerted refusal to work"

"(b) As a violation of Section 8(b)(4)(A)"

10. Respondents except to each of the following Findings of the Trial Examiner separately:

[fol. 41] (a) That the four members of Local 74 employed at the Stanley residence were not all doing the work of a carpenter (p. 10, footnote 27, l. 57-61);

(b) That the so-called concerted refusal to work was for the purpose of inducing customers not to patronize Watson's (p. 11, l. 2-3);

(c) That Stanley was an "employer customer of Watson's" (p. 11, l. 6);

(d) That "the carpenters concertedly quit working on the Stanley job because of the employment thereon of Watson's installation employees" (p. 11, l. 7-9);

(e) That the carpenters ceased work at Stanley's residence "as a means of forcing or requiring" Stanley to hire union installers (p. 11, l. 9-10);

(f) That "the only way Stanley could acquire union installers was by breaking his agreement with Watson's" (p. 11, l. 10-12);

(g) That "it is not disputed that a strike order, such as the above, issued by a union on or after August 22, 1947 would constitute a violation of" subsection 8(b)(4)(A) (p. 11, l. 14-16; see exhibit I attached hereto and made a part hereof);

(h) That Henderson's order to cease work did not go into effect on August 21, 1947 (p. 11, l. 16-30);

(i) That the record will not support the assumption that the union carpenters quit work on August 21, 1947 (p. 11, l. 18-21);

(j) That "the only testimony in the record to the effect that the order became effective and the union men involved ceased work on August 21 is that of Stanley and Rose" (p. 11, l. 21-24);

(k) That the remainder of the testimony in this respect, including that of the only two union carpenters who testified, clearly shows that the carpenters completed their day's work on August 21, 1947 (p. 11, l. 25-28);

(l) That "the strike" started on the morning of August 22, 1947 (p. 11, l. 28-9);

[fol. 42] (m) That "even Henderson did not intend that the carpenters should forthwith pick up their tools and leave the job at the time he issued the order" (p. 11, l. 29-31);

(n) That "any doubt as to whether the men completed their work on the day the order was issued is removed by Timekeeper Robert S. Freeman" (p. 11, l. 44-46);

(o) That "the record • • • shows conclusively that, while the order to cease work was issued on August 21, there was no attempt to put it into immediate effect" (p. 12, l. 23-26);

(p) That "Judge Darr's findings as to the facts" should not be followed (p. 12, l. 4-41);

(q) That the determination of Judge Darr does not settle any of the issues of fact or law before the Trial Examiner (p. 12, l. 42-44);

(r) That the order to cease work, issued on August 21, 1947, did not take effect and was not intended to take effect until the beginning of the next succeeding work day, August 22, 1947 (p. 12, l. 46-49);

(s) That "even if it be assumed that the concerted refusal to work, or the strike, was not only called on August 21 but that it actually became effective on that date," such refusal to work would still be an unfair labor practice within the meaning of Section 8(b)(4)(A) of the Act, since it continued on and after August 22, 1947 (p. 13, l. 1-16);

(t) That even if it be assumed that the "order to strike" not only was given on August 21, 1947, and became effective on that day, the failure to rescind it on August 22, 1947, or thereafter, was an unfair labor practice within the meaning of Section 8(b)(4)(A) of the Act (p. 13, l. -1-5);

(u) That the failure of Local 74 to order "the strike" terminated or to rescind "the strike order," when informed of it on the evening of August 22, 1947, was an unfair labor practice within the meaning of Section 8(b)(4)(A) of the Act. (p. 13, l. 9-16);

[fol. 43] (v) That "the strike order issued by the Respondent caused the union carpenters to strike and to refuse concertedly to continue with their work on the Stanley residence" (p. 13, l. 18-20);

(w) That an object of the cease work order was to require Stanley to cease doing business with Watson's in violation of Section 8 (b)(4)(A) of the Act (p. 13, l. 18-22);

(x) That the type of wall and floor coverings could only be obtained from Watson's (p. 13, l. 54-5);

(y) That the contract made by Stanley with Watson's was with the acquiescence of Parker (p. 13, l. 55-7);

(z) That Stanley's agreement with Watson's was a legitimate modification of the previously existing agreement between Stanley and Parker for the renovation of the Stanley home (p. 13, l. 58-9);

(aa) That it is immaterial whether the purpose of Watson's agreement with Stanley was to have Watson's non-union men take over some of the employment on which the union men were engaged at Stanley's residence and which they were competent to perform (p. 13, l. 60-4);

(bb) That the withdrawal of the union men as a protest against the injection of Watson's non-union men to take over some of the employment on which the union men were engaged at Stanley's residence and which they were competent to perform was an unfair labor practice within the meaning of Section 8(b)(4)(A) of the Act (p. 13, l. 60-4);

(cc) That at the commencement of working hours on August 22, 1947, the amendments in Title I of the Act were in effect (p. 13, l. 9-11).

Failures or Refusals to Find

11. The Respondents except, in each of the following instances separately, to the Trial Examiner's failure and/or refusal to find:

[fol. 44] (a) That prior to August 22, 1947, Watson's and Stanley formed a plan to force or require Parker to transfer and assign to Watson's non-union employees some

of the employment on which the union men were engaged at Stanley's residence and which they were competent to perform;

(b) That Watson's refusal to sell floor and wall covering to Stanley unless Stanley agreed to install it with Watson's employees had as an object forcing or requiring Parker to transfer and assign to Watson's non-union employees some of the employment on which the union men were engaged at Stanley's residence and which they were competent to perform;

(c) That Watson's refusal to sell floor and wall covering to Stanley unless Stanley agreed to install it with Watson's employees had as an object forcing or requiring Stanley to bring about the transfer and assignment to Watson's non-union employees of some of the employment on which the union men were engaged at Stanley's residence and which they were competent to perform;

(d) That Watson's and Stanley concerted to deprive the union men of some of the employment on which they were engaged at Stanley's residence and which they were competent to perform;

(e) That the course of the union men in withdrawing when non-union men were injected into their employment at Stanley's residence was not an unfair labor practice within the meaning of Section 8 (b)(4)(A) of the Act:

(f) That the course of the union men in withdrawing had as its object non-acquiescence in the attempt to invade their employment and craft with non-union men;

(g) That the course of the union men in withdrawing was an exercise of a lawful right not to acquiesce in the invasion of their employment and craft by non-union men;

(h) That the installing of floor and wall coverings at Stanley's residence was part of the work which Parker [fol. 45] had, upon contracting with Stanley, selected the union men to do;

(i) That the installing of floor and wall coverings at Stanley's residence was work which members of Local 74 were competent to do and which was within the craft of that Local.

"(3) *Constitutional questions*".

12. Respondents except to the Finding of the Trial Examiner that no constitutional question was raised at the

hearing or in the briefs filed relative to the alleged violation of Section 8(b)(4)(A) of the Act (p. 13, l. 30-31; see Exhibit 1 attached hereto and made a part hereof).

13. Respondents except to the failure of the Trial Examiner to consider and decide their "Motion" to dismiss accompanying and made part of their filed "Answer and Motion" herein (p. 13, l. 26-32).

14. Respondents except to the refusal of the Trial Examiner to pass upon the issue of constitutionality if Section 8 (b)(4)(A) of the Act be held to render any conduct of the Respondents an unfair labor practice (p. 14, l. 10-26).

"III. *The effect of the unfair labor practices upon commerce*"

15. Respondents except to the Finding of the Trial Examiner that the actions of the respondents in so far as Watson's is concerned, had a substantial relation to commerce among the several States and tended to burden and obstruct commerce and the free flow of commerce (p. 14, l. 31-35).

"IV. *The remedy*"

16. Respondents except to the Finding of the Trial Examiner that "there is a possibility, if not a probability that similar acts may be repeated in the future by the Respondents" (p. 14, l. 43-44).

[fol. 46] Conclusions of Law

17. Respondents except to the Conclusions of the Trial Examiner that Watson's is engaged in commerce within the meaning of the Labor-Management Relations Act, 1947 (p. 15, l. 3-5).

18. Respondents except to the Conclusion of the Trial Examiner that the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b)(4)(A) of the Act (p. 15, l. 12-19).

19. Respondents except to the Conclusion of the Trial Examiner that the activities mentioned in "18" above are unfair labor practices affecting commerce within the meaning of the Act (p. 15, l. 21-23).

Recommendations

20. Respondents except separately and severally to each of the Recommendations of the Trial Examiner, including those set forth in lines 44 to 49 of page 14; lines 49 to 51 of page 14; lines 38 to 44 of page 15; lines 45 to 60 of page 15; and lines 1 to 3 of page 16.

None of the specific exceptions set forth above is intended to limit, nor do they limit, the right of the Respondents to except to those portions of the Trial Examiner's report set forth generally in the first paragraph of page 1 herein.

Each of the foregoing exceptions is taken separately and severally by each Respondent.

The foregoing exceptions are based upon the further grounds that the Findings of Fact, Conclusions of Law and Recommendations, deprive the Respondents of the rights guaranteed to them under the Constitution of the United States, particularly the First, Fifth, Tenth and Thirteenth Amendments thereof; and that such Findings, Conclusions and Recommendations do and will not effectuate the purposes and policies of the Act and are contrary thereto.

[fol. 47] Dated, New York, N. Y., January 12, 1948.

Charles H. Tuttle, Francis X. Ward, 15 Broad Street, New York 5, N. Y.; Herbert G. B. King, 719 Chattanooga Bank Building, Chattanooga, Tennessee, Attorneys for Respondents.

EXHIBIT I TO RESPONDENT'S EXCEPTIONS

Breed, Abbott & Morgan
15 Broad Street
New York 5, N. Y.

January 3, 1948.

Hon. J. J. Fitzpatrick, Trial Examiner
National Labor Relations Board
Washington 25, D. C.

Matter of Local 74, United Brotherhood of Carpenters (Chattanooga) — Case No. 10-CC-1

Dear Sir:

Your Intermediate Report dated December 29, 1947, in the above matter reached me in the mail late Wednesday afternoon (December 31st).

Although we shall file exceptions thereto, there are two statements in the Intermediate Report which we believe should be called to your attention as demonstrably incorrect.

[fol. 48] I.

I shall first refer to the statement on page 13 where in connection with your finding that there was a "strike" in violation of Section 8 (b) (4) (A) you say

> "No constitutional question was raised at the hearing or in the briefs filed relative to the strike."

The facts are, first, that at the very outset and in connection with our very first pleading we filed with the Board a formal paper entitled *"Answer and Motion"*. In that Answer and Motion we requested, among other things,

> "Local 74 and Jack Henderson, therefore, request this Board to dismiss the complaint herein on each and all of the grounds enumerated in their aforesaid motion in the Federal Court (Exhibit B hereto annexed) and on the further ground that the complaint herein is without merit and no order of this Board adverse to Local 74 and Jack Henderson is or would be justified. They also ask for such further and other relief as may be just."

In consequence, formally and on the record and as part of the very foundation of the respondents' case and position, we formally presented a motion to dismiss, as well as an Answer, and that Motion included the following among the assigned reasons for dismissal of the Board's petition:

> "Because if the alleged facts set forth in the petition constitute a violation of Section 8(b), subsection (4) (A) of the National Labor Relations Act as amended June 23, 1947, such statute affords no lawful basis for the petition, because such statute, or at least its application to the alleged facts set forth in the petition, is unconstitutional and in violation of the First, Fifth, Tenth and Thirteeth Amendments to the Constitution of the United States, as abridging the freedom of speech, as depriving the respondents of liberty and property without due process of law, as exercising power not delegated to the United States by the Con- [fol. 49] stitution, and as imposing involuntary servitude in a case where punishment for crime is not involved."

At the outset of the proceedings before you counsel for the Board made part of the record (p. 9) this "Answer and Motion" of the respondents and had those papers marked Exhibit 1-E for identification.

At the close of the whole case you stated (p. 506) that the parties would be given an opportunity to file briefs. One of the pending matters was our aforesaid formal written motion associated with and also incorporated in our Answer. On page 2 of the brief, which we thereupon filed, under the heading of "Respondents' Position" we stated:

> "The motions made on behalf of Local Union 74 and Jack Henderson, individually and as agent of said Local Union 74, should be granted and the complaint dismissed."

As already stated, included in the aforesaid Motion was the very ground that if Section 8 (b) (4) (A) were considered applicable to any conduct of the respondents it was unconstitutional.

Our argument in support of that claim of unconstitutionality was elaborated on pages 25 to 30, inclusive, of

our brief and was also brought up at other points. We particularly mentioned the First, Fifth, Tenth and Thirteenth Amendments to the Constitution of the United States and the decisions of the United States Supreme Court interpreting them in connection with the rights of union men.

We concluded our brief with the following summary (p. 51):

> "The motions made on behalf of Local Union 74 and Jack Henderson, individually and as agent of said Local Union 74, should be granted and the complaint dismissed."

In short, pursuant to Board Rule 20324 we made a formal [fol. 50] written motion for a dismissal, including constitutional grounds as to Section 8 (b)(4)(A). That motion has at all times been pending and under Rule 20325 the respondents were entitled to a direct ruling thereon. I do not find, however, that the Intermediate Report makes any reference to that formal written motion,—much less rules on it.

II.

The other statement in the Intermediate Report, to which I refer, is at page 11 and reads:

> "It is not disputed that a strike order, such as the above, issued by a union on or after August 22, 1947, would constitute a violation of the subsection" 8 (b) (4) (a).

The respondents' formal Answer in this proceeding denied specifically each and all of the allegations and statements in paragraphs XI and XIV of the Board's complaint, which are the only paragraphs in that complaint referring to Section 8 (b) (4) (A). Furthermore, our aforesaid "Motion for Dismissal of Petition" included the following ground:

> "4. Because the petition fails to state a claim or case upon which relief can or should be granted." (p. 1)

This motion was, as stated above, one of the motions which are mentioned at pages 2 and 51 of our brief and which we claimed therein should be granted. At various

places in our brief the argument was pressed that Section 8 (b) (4) (A) could have no application. For example, at pages 22-25 of the brief we argued that a withdrawal by the union men because of an effort by a non-union employer to have the jobs of the union men transferred to his non-union employees was not a violation of Section 8 (b) (4) (A) under any circumstances. We analyzed the debates in Congress concerning this section of the Taft-Hartley Act and concluded (p. 25):

> [fol. 51] "These statements by Senator Taft and in the Conference Report show conclusively that neither provision of Section 8, sought to be evoked by the Board in this case, can have any application here."

I realize this letter is of some length, but I have written it in the hope that you may feel it appropriate and fair to withdraw or correct the two statements to which I have referred above.

I am sending copies of this letter to the attorneys for all interested parties.

Respectfully yours,

CHT:em Charles H. Tuttle.

National Labor Relations Board
Washington 25, D. C.
January 6, 1948

Judge Charles H. Tuttle
Breed, Abbott & Morgan
15 Broad Street
New York City 5

Re: Matter of Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L.

Dear Judge:

I have your letter of January 3, 1948, and thank you for calling my attention to the two points you have in mind relative to certain language employed by me in my conclu-

sions in the Intermediate Report issued on December 31, 1947, in the above matter.

As you are undoubtedly aware, under the Board's rules, when an Intermediate Report has been issued an order is also entered transferring the case to the Board. Such being the situation in the above case, I am sure that you [fol. 52] will agree that the matter being no longer before me your contentions should be presented directly to the Board.

Nevertheless, I appreciate your writing me about it.

Very truly yours,

J. J. Fitzpatrick, Trial Examiner.

cc: John C. McRee, Esq.,
1200 Atlanta National Bldg.
Atlanta, Georgia

James J. Griffis, Esq.
824 Hamilton Bank Bldg.
Chattanooga, Tenn.

Jac Chambliss, Esq.
Provident Bldg.
Chattanooga, Tenn.

Herbert G. B. King, Esq.
719 Chattanooga Bank Bldg.
Chattanooga, Tenn.

[fol. 53] BEFORE NATIONAL LABOR RELATIONS BOARD

Decision and Order

(Signed November 22, 1948)

On December 29, 1947, Trial Examiner J. J. Fitzpatrick issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Trial Examiner also found that the Respondents had not engaged in any

unfair labor practices in violation of Section 8 (b) (1) (A) of the Act and recommended that these allegations of the complaint be dismissed. Thereafter, the Respondents and the General Counsel filed exceptions to the Intermediate Report; and the Respondents filed a brief. The General Counsel filed no brief in support of his exceptions.

On July 15, 1948, the Board heard oral argument at Washington, D. C., in which only the Respondents participated. With permission of the Board, the General Counsel filed a supplementary brief in lieu of oral argument, and the Respondents a reply thereto.

The Board has reviewed the rulings of the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the briefs and exceptions, the contentions advanced by the Respondents at the oral argument, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions and modifications:

1. *Jurisdiction*

The Respondents contend, in effect, contrary to the finding of the Trial Examiner, that the Board does not have—and in any event should not exercise—jurisdiction over the labor dispute here involved because, *inter alia*, (1) the transaction between Watson and Stanley was local, having no substantial effect upon interstate commerce, and (2) the Act has no application to the building construction [fol. 54] industry. For reasons appearing below, we find insufficient merit in the first of these contentions.[1]

That the Congress has properly delegated to the Board plenary power to prevent unfair labor practices affecting or tending to affect, interstate commerce is no longer open to question.[2] In determining the scope and the reasonable

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[1] In view of our holding in *Matter of J. H. Patterson Co.*, 79 N.L.R.B., No. 48, where we have asserted jurisdiction over a substantial enterprise associated with the building industry, we also reject the second contention.

[2] *N. L. R. B.* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1; *Polish National Alliance* v. *N. L. R. B.*, 322 U. S. 643.

exercise of that power, the Supreme Court of the United States stated "that interstate commerce itself is a practical conception . . . [and] that interferences with that commerce must be appraised by a judgment that does not ignore actual experience."[3] Thus, whether the Board has, and should exercise, jurisdiction herein depends upon the nature of the business operations of Watson and Stanley, and the extent of Congressional concern with the practical effect of the Respondents' conduct on the operations of either or both.

Watson, a large chain store operating in seven States, is, as found by the Trial Examiner, engaged in commerce within the meaning of the Act. Its purchases and sales across State lines are substantial in size. On the other hand, Stanley's activity in remodeling his own residence was, if viewed in isolation, a local operation. But the fact that the Respondents' work stoppage, aimed as it was at Watson, occurred at Stanley's local operation does not necessarily immunize it against the interdictions of the Act. For, in *N. L. R. B.* v. *Fainblatt*,[4] the Supreme Court of the United States held:

> It has been well settled by repeated decisions of this Court that an employer may be subject to the National Labor Relations Act although not himself engaged in commerce. The end sought in the enactment of the statute was the prevention of the disturbance to interstate commerce consequent upon strikes and labor [fol. 55] disputes induced or likely to be induced because of unfair labor practices named in the Act . . . long before the enactment of the National Labor Relations Act it has been many times held by this Court that the power of Congress extends to the protection of interstate commerce from interference or injury due to activities which are wholly intrastate.

While it may be conceded that the complainant Watson's work on the Stanley residence constituted a relatively small portion of Watson's business whose impact on inter-

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[3] *N. L. R. B.* v. *Jones and Laughlin Steel Corp.*, *supra*, p. 41-42.

[4] 306 U. S. 601, 604-5.

state commerce could, in isolation, be regarded as *de minimis*, the effect of the Respondents' unfair labor practice on interstate commerce "is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others . . . , the total incidence of which, if left unchecked, may well become far reaching in its harm to commerce."[5] In the present case, the effect of the Respondents' conduct on commerce cannot be measured solely in terms of the Stanley agreement, for any widespread application of such pressure by the Respondents to other customers of Watson, such as can reasonably be anticipated on the basis of this record, could well result in a substantial decrease in Watson's business and in material purchased from points outside the State of Tennessee.[6] Moreover, the legislative history of the 1947 amendments is replete with evidence that, especially where secondary boycotts were concerned, Congress intended the Board to exercise its plenary power to protect small and relatively local enterprises against the impact of union boycotts aimed at the *installation* of materials furnished by primary employers, the interstate character of whose business is clear.[7]

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[5] *Polish National Alliance* v. *N. L. R. B.*, *supra*, at p. 648.

[6] See *Wickard* v. *Filburn*, 317 U. S. 111.

[7] See particularly the Senate Committee Report on Section 8 (b) (4) (A), at p. 22:

> This paragraph also makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by Local No. 3 of the IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than Local No. 3. (See testimony of R. S. Edwards, vol. 1, p. 176 et seq.; *Allen Bradley Co.* v. *Local Union No. 3, I.B.E.W.*, 325 U. S. 797.) (Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess. (1947)).

See also statement by Senator Taft on April 29, 1947 (93 Cong. Rec. 4323):

> * * * the principal point of the Senator from Florida is similar to that in the case of the New York Electrical

[fol. 56]. On the basis of the entire record, we find that the Respondents' unfair labor practices, hereinafter found, affect commerce, within the meaning of the Act, and also that it would best effectuate the policies of the Act to exercise jurisdiction in the instant case.[8]

2. *Subsection 8 (b) (4) (A)*

The Trial Examiner found, and we agree, that the Respondents violated Section 8 (b) (4) (A) of the Act, by participating in and inducing a strike at the Stanley residence, which had as an objective, forcing Stanley to cease doing business with Watson.

It is conceded that on August 21, 1947, the day before Section 8 (b) (4) (A) became effective, the Union's business representative, Henderson, ordered the carpenters[9] to cease work at the Stanley residence because Watson's non-union employees were also performing work on the job, and that thereafter, pursuant to said order, which was never rescinded and at all times material remained [fol. 57] effective, the carpenters refused to work on the

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Workers' Union, which said, "We will not permit any material made by any other union or by any nonunion workers to come into New York City and be put into any building in New York City." The principle announced by the Senator from Florida would make that stand lawful, as it is lawful today. Of course we propose to change the law in that respect.

House Report No. 245 on H. R. 3020, 80th Cong., 1st Sess. (1947), p. 24; Senate Report No. 105 on S. 1126, p. 54; 93 Cong. Rec. 4255, 5143.

[8] See *United Brotherhood of Carpenters et al.* v. *Sperry et al.*, United States Court of Appeals for the Tenth Circuit, decided November 2, 1948.

[9] The term carpenters, as used herein and in the Intermediate Report, refers to the four members of Local 74 employed to work on the Stanley residence. We agree with the Respondents that it is immaterial for purposes of this decision whether the carpenters were employees of Stanley or of Parker, who had contracted with Stanley to do certain work on the latter's residence, as set forth in the Intermediate Report.

job.[10] The pertinent inquiry is whether this strike had an objective prescribed by Section 8 (b) (4) (A) of the Act. The Respondents contend that the strike had no unlawful objective, because there was economic justification for the carpenters' refusal to work alongside of Watson's non-union employees. However, it is not necessary to decide, nor do we here decide, whether a union's mere inducing of its members to refuse to work on a common project with non-union employees of another employer constitutes *per se* a strike prescribed by Section 8 (b) (4) (A), because we are convinced by the record as a whole, as was the Trial Examiner, that the strike at the Stanley residence had another and an unlawful objective.

In March 1947, Henderson solicited Watson's installation employees to join the Union, and they refused. Notwithstanding this, Henderson attempted to have Watson sign a closed-shop contract covering these employees. When Watson refused because its employees were not union members, the Union began to picket Watson's store and otherwise to publicize adversely the unorganized status of Watson's employees. Contemporaneously with the picketing, Henderson applied further indirect pressure against Watson and his employees, by ordering the carpenters "to pack up their tools" and cease working on the Stanley residence because Watson's employees were on the job.[11] At that time, according to Stanley's credible testimony, Henderson suggested that Stanley cancel his contract with Watson as a means of getting the carpenters to return to work.[12] Upon the entire record, especially the foregoing circumstances, we are convinced and find that one of the objectives of the work stoppage ordered by the Respondents was to force Stanley to cease doing [fol. 58] business with Watson, in violation of Section 8 (b) (4) (A) of the Act.

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[10] The Trial Examiner erroneously stated that the Respondents did not dispute that the strike order in question would have been illegal if issued after August 22, 1947.

[11] There were but two groups of employees then on the job: the carpenters and Watson's installation employees.

[12] Henderson's denial appears inconsistent with all objective circumstances in the record and is not credited.

The Respondents further contend that the strike order and the resultant cessation of work occurred on August 21, 1947, the day before the effective date of Section 8 (b) (4) (A) of the Act, and could not in any event be violative of the Act. Conceding the factual portion of the Respondents' contention, we find no merit in its legal conclusion. This conclusion is based largely on the premise that when the carpenters ceased work on August 21, their employment relationship was thereby terminated. Analogous arguments were advanced by employers in seeking to avoid liability under the Wagner Act, and we, as well as the courts, consistently found them without merit.[13] It is clear that the carpenters ceased work on August 21 as a result of a labor dispute, within the meaning of Section 2 (9) of the Act.[14] and that on the following day, when the amendment became effective, and at all material times thereafter, they were and remained "employees," within the meaning of Section 2 (3) of the Act.[15] There is no substantial evidence that, when the carpenters ceased work on August 21, they intended permanently to abandon their employment at the Stanley residence; on the contrary, we are convinced that under orders from the Respondents, the carpenters merely intended to withhold their services until such time as the Respondents' demand was met. That the strikers never returned to work because those demands were not met before completion of the job on August 28, is not determinative of

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[13] See, i.e., *N. L. R. B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 334; *Matter of Fafnir Bearing Co.*, 73 N. L. R. B. 1008; *Matter of St. Mary's Sewer Pipe Co.*, 54 N. L. R. B. 1226; *Matter of Kokomo Sanitary Products*, 26 N. L. R. B. 1.

[14] This section reads: "The term 'labor dispute' includes any controversy concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless whether the disputants stand in the proximate relation of employer and employee."

[15] This section in part reads: "The term 'employee' shall include any employee . . . and shall include any individual whose work has ceased as a consequence of or in connection with, any current labor dispute . . ."

[fol. 59] the employee status of the carpenters at material prior times.

Nor is it material, as the Respondents contend, that the labor dispute had its origin before the effective date of the amended Act, for we are convinced that it was continued and prolonged after the effective date by the very same factors which originally created it and for the same original objective which as found above, Section 8 (b) (4) (A) declares unlawful.[16] Thus, at material times both before and after the effective date of the amendments, (1) Watson's non-union employees worked on the Stanley job; (2) the Respondents' strike order, which admittedly was never rescinded, was outstanding and effectively prevented the carpenters from officially working on the job as long as Watson's men were also working; and (3) the Respondents picketed the Watson store in connection with the then current labor dispute between Watson and the Respondents. In view of the foregoing, we agree with the Trial Examiner's conclusion that under settled authority the Respondents' continuation of the strike order and of the resultant strike on and after August 22, 1947, was subject to the interdictions of Section 8 (b) (4) (A) of the Act.[17]

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[16] In reaching this conclusion, we have respectfully considered the opinion in *Styles* v. *Local* 74 *et al.*, 74 F. Supp. 499 (D.C. Tenn.), denying the General Counsel's petition for injunctive relief on the facts here involved. It is not within our province, *nor do we,* question the propriety of the district court's dismissal of the *injunction* proceedings, but, as the court itself indicated, we are not bound in the instant proceeding by the findings made on the record before it.

[17] See *Jeffery-DeWitt Insulator Co.* v. *N. L. R. B.*, 91 F. 2d 134 (C. C. A. 4), where the court, in considering an analogous issue with respect to the effective date of the Wagner Act, stated that "The mere fact that the labor dispute had commenced prior to the passage of the Act does not withdraw the parties or the dispute from the regulatory power of Congress as to acts subsequently occurring . . . Certainly the unfair labor practices forbidden by the Act would tend to prolong such disputes, and there was just as much reason to forbid them in existing labor dis-

[fol. 60] The Respondents also seek to justify their conduct under the holding of the district court in *Douds* v. *Metropolitan Federation of Architects*.[18] There, in an ancillary injunction proceeding involving the applicability of Section 8 (b) (4) (A) of the Act, the district court in effect found no violation, on the ground that the two employers there involved were "allies" and consequently were not "doing business with" one another, within the meaning of Section 8 (b) (4) (A) of the Act. We are satisfied that the record in the instant case establishes no reasonable basis for applying that principle here.

Nor do we find merit in the Respondents' contention that Section 102 of the Act[19] bars an unfair labor practice finding herein. The illegality of the Respondents' conduct lies not in its action before the effective date of the amended Act, but rather in its continuation of the strike thereafter.

3. *Section 8 (b) (1) (A)*

For reasons appearing in the Intermediate Report and in the Board's opinion in *Matter of National Maritime Union of America* (78 N. L. R. B., No. 137), we find no

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putes as in disputes which might subsequently arise. So long as there was an existing relationship between the company and its striking employees affecting commerce as defined in the Act, this relationship was subject to the regulatory power of Congress; and the Act is given a prospective operation when applied to subsequent unfair labor practices affecting such relationship, notwithstanding they may have occurred in the course of a labor dispute which had its origin before the Act was passed."

Under the circumstances here present, we deem it immaterial whether the strike actually began on the afternoon of August 21 or on the following morning. Consequently, we do not rely on or adopt the Trial Examiner's finding that the strike did not actually begin until the morning of August 22.

[18] 75 F. Supp. 672 (D. C. N. Y.).

[19] This section provides that "No provision [in the amending act] shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto."

merit in the General Counsel's exceptions to the Trial Examiner's finding that the Respondents did not violate Section 8 (b) (1) (A) of the Act, (1) by peacefully picketing Watson's own store at a time when Local 74 represented none of its employees, and (2) by engaging in conduct violative of Section 8 (b) (4) (A). We shall accordingly dismiss the 8 (b) (1) (A) allegations of the complaint.[20]

[fol. 61] Order

Upon the basis of the entire record in this proceeding and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondents, Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and Jack Henderson, the business agent of Local 74, and their agents, shall:

1. Cease and desist from engaging in or inducing the members of Local 74 to engage in a strike or a concerted refusal in the course of their employment to perform services for any employer, where an object thereof is to require any employer or other person to cease doing business with Ira A. Watson, doing business as Watson's Specialty Store.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post in conspicuous places at the business office of Local 74, in the city of Chattanooga, Tennessee, copies of the notice attached to the Intermediate Report as an appendix.[21] Copies of the notice, to be furnished by the Regional Director for the Tenth Region, shall, after being duly signed by a representative of Local 74 and by Jack Henderson as business agent of said Local, be posted immediately upon receipt thereof and maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the

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[20] *Board Member Gray* concurs in this conclusion because, in his view, the reasons set forth in his dissenting opinion for finding a violation of Section 8 (b) (1) (A) in the *National Maritime Union* case, are not applicable to the kind of conduct involved in this case.

Respondents to insure that said posted notices are not altered, defaced, or covered by any other material;

(b) Notify the Regional Director for the Tenth Region [fol. 62] in writing, within ten (10) days from the date of this Order, what steps the Respondents have taken to comply herewith.

It Is Further Ordered that the complaint be, and it hereby is, dismissed, insofar as it alleges that the Respondents violated Section 8 (b) (1) (A) of the Act.

Signed at Washington, D. C., this 22nd day of November, 1948.

(Seal) Paul M. Herzog, Chairman; James J. Reynolds, Jr., Member; Abe Murdock, Member; J. Copeland Gray, Member, National Labor Relations Board.

Paul M. Herzog, Chairman, concurring:

The General Counsel having seen fit to prosecute this case, I believe that the Board is under a duty to complete the task by asserting jurisdiction. This is because explicit statements in the 1947 legislative history reveal an affirmative intention by Congress to invoke its full Constitutional power to prevent secondary boycotts, even where their immediate impact is only on local enterprises.[22] If, however, I thought the exercise of Board discretion permissible, I would, consistently with the view expressed in recent representation cases, refrain from

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[21] Said notice shall be, and it hereby is, amended by striking from the first paragraph thereof the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER," and substituting in lieu thereof the words "A DECISION AND ORDER"; and by striking from the text the last four words reading "or any other person." In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be inserted before the words "A DECISION AND ORDER," the words, "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING."

[22] This conclusion is borne out by the citations and quotations in footnote 7 of the majority opinion.

applying the Federal power to so local and so diminutive a controversy.[23] On the merits, the statute dictates the result reached by the majority, in which I join.

Paul M. Herzog, Chairman, National Labor Relations Board.

[fol. 63] John M. Houston, dissenting:

I believe that the effect on commerce here is so remote and so insubstantial and that the controversy involved is so local in character as to make undesirable any exercise of the Federal power. I see no compulsive consideration in the legislative history of the amended statute which would dictate the contrary merely because the operation involved concerns the building and construction industry.

Signed at Washington, D. C., this 22nd day of November, 1948.

John M. Houston, Member, National Labor Relations Board.

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[23] Dissenting opinions in *Matter of Liddon-White Truck Company, Inc.*, 76 N. L. R. B. 1181; *Matter of J. H. Patterson*, 79 N. L. R. B., No. 48.

[fol. 64] Before the

NATIONAL LABOR RELATIONS BOARD

Tenth Region

Case No. 10-CC-1

In the Matter of LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., and JACK HENDERSON, individually and as agent for LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., and IRA A. WATSON COMPANY, d/b/a, WATSON'S SPECIALTY STORE

Transcript of Testimony and Proceedings

Room No. 26,
U. S. Post Office Building,
Chattanooga, Tennessee,
Thursday, October 23, 1947.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 a. m.

Before: J. J. FITZPATRICK, Trial Examiner.

APPEARANCES:

John C. McRee, Esq., 1200 Atlanta National Building, Atlanta, Georgia, appearing on behalf of the National Labor Relations Board.

Jac Chambliss, Esq., Provident Building, Chattanooga, Tennessee; and James J. Griffis, Esq., 824 Hamilton Bank Building, Chattanooga, Tennessee; appearing on behalf of Ira A. Watson Company, d/b/a Watson's Specialty Store, the Charging Company.

[fol. 65] Charles H. Tuttle, Esq., by Francis X. Ward, Esq., 15 Broad Street, New York City 3, New York; and Herbert G. B. King, Esq., 719 Chattanooga Bank Building, Chattanooga, Tennessee; appearing on behalf of Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and Jack Henderson, individually and as agent for Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., the Respondents.

* * * * * *

A. D. SMITH, a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Fitzpatrick: Take a seat and give us your name, please.

The Witness: A. D. Smith.

Trial Examiner Fitzpatrick: Is that 'A'?

The Witness: A. D.

Trial Examiner Fitzpatrick: Smith.

Proceed, Mr. McRee.

Direct examination.

By Mr. McRee:

Q. Mr. Smith by whom are you employed?

A. Ira A. Watson Company.

Q. Ira A. Watson Company? And how long have you worked for that Company?

A. About ten years.

Q. And what is your position with them?

A. Store Manager.

Q. Store Manager?

A. Yes, sir.

Q. Is that here in Chattanooga?

A. In Chattanooga.

Q. And what is the name of that store?

A. Watson's Specialty Store.

Q. Watson's Specialty Store.

Do you know whether the—what sort of Company the [fol. 66] Ira A. Watson is? Is it a corporation, partnership, individually-owned concern?

A. It is a corporation; yes, sir.

Q. Do you know what State in which it's incorporated?

A. Delaware.

Q. Delaware.

And where is its principal office and place of business?

A. Knoxville, Tennessee.

Q. Knoxville, Tennessee.

And as I understand your testimony, that Company owns the store that you are the Manager of here in Chattanooga?

A. That's right.

Q. Do they have any other stores other than the one in Chattanooga?

A. Yes, they operate approximately 26, 27 stores.

Q. 26 or 27 stores.

And where are those stores located? I don't mean—what States are they located in? Let's put it that way.

A. Tennessee, Kentucky, Alabama, Virginia, West Virginia, and North Carolina.

Q. What is the nature of the business of the Watson's Specialty Store here in Chattanooga?

A. We—

Q. What sort of merchandise do you handle and what other services do you render?

A. Floor coverings, paints, venetian blinds and the installation of floor covering and wall covering.

Q. When you refer to floor coverings, I wish you'd just explain for the record what sort of coverings do you handle.

A. That means linoleum, asphalt tile, rubber tile, carpeting.

Q. That is wool?

A. Wool carpeting.

Q. Carpeting?

A. Yes, sir; rugs and so forth.

Q. Now, you say linoleum; do you handle inlaid linoleum as well as linoleum rugs?

A. Yes, sir.

[fol. 67] Q. Now, what type of wall coverings do you handle?

A. We have two types of metal wall covering and another type, a linoleum product, that we also install.

Q. You don't handle wallpaper or—

A. No, sir.

Q. Products of that nature?

What types of—what are the names of these metal wall coverings that you have?

A. Chromite; Lumitile.

Q. Now, I understand you to testify that you also install certain of these products.

A. We install practically everything we sell; that is, 95 per cent or more of inlaid linoleum, asphalt tile and wall covering is sold installed only.

Q. In other words, when you sell that, you also contract to do the installation work?

A. That's right.

Q. On that type of product.

How long has this Watson's Specialty Store been operating here in Chattanooga?

A. Since March 17th, this year.

Q. 1947?

A. Right.

Q. Now, did Watson's—did the Ira A. Watson Company operate a store here in Chattanooga before that date?

A. Yes, sir; we operated a store here about 16 or 17 years.

A. And how long have you been the Manager here?

A. Almost four years.

Q. What was the nature of the business of the store that was operated before March of this year?

A. General merchandise, such as dry goods, shoes, clothing and—

Q. And did you have a wall and floor covering department in that store prior to March of this year?

A. Yes, sir; I did.

Q. About how long have you been in that type of business, do you know, here in Chattanooga?

A. Near three years; In other words, I started the floor [fol. 68] covering department about three years ago.

Q. About three years ago.

Well, prior to the—let me ask you this question: Prior to March 17th, did you operate this other store under the trade name and style of Watson's Specialty Store.

A. No.

Q. What was the name used in the operation of that store?

A. Ira A. Watson Company, or Watson's.

Q. And prior to March of this year, did you also have men employed in your installation department?

A. Yes, sir.

Q. Mr. Smith, as Manager of this store, do you have supervision of the keeping and maintaining of your records showing purchases and sales?

A. Yes, sir.

Q. Do you have your records with you, your invoice records to show from whom you have purchased materials and where those materials originated which were shipped to you?

A. I do have; yes, sir.

Q. Have you examined those records and prepared a list from those invoice records?

A. Yes, sir.

Q. Showing the suppliers who shipped directly to you from States other than the State of Tennessee, and the total amount you have purchased from those particular suppliers?

A. That's right, separated the direct from the distributors.

Q. And you have in court with you the original invoices from which this list was compiled?

A. Yes, sir.

Mr. McRee: Mr. Reporter, will you mark as Board's Exhibit 2-A for identification a list consisting of two pages, entitled "List of Suppliers Who Ship Directly to Watson's From Other States".

(Thereupon the document above referred to was marked Board's Exhibit No. 2-A for identification.)

[fol. 69] By Mr. McRee:

Q. M. Smith, I hand you this document which has been marked Board Exhibit 2-A for identification (handing document to witness). I'll ask you if that is a list which you have compiled from your invoice records, showing the names of the suppliers and the total amount of your purchases from those suppliers who shipped directly to your place of business from States other than the State of Tennessee.

A. That's right, sir.

Q. Now, what period of time do these total purchases cover?

A. There's two figures here. The total here is—this is the inventory brought over from the old store.

Q. Now, you're referring now to a notation in ink?

A. That's right.

Q. In the—on the bottom of the second page of this document, which is an abbreviation for merchandise, I suppose—(spelling) m-d-s—brought from old store, and then the figure $33,801.92.

A. That's right.

Q. Well, now, that—that is—let me ask you what that figure represents.

A. That represents merchandise brought over from the old store in March.

Q. In other words, when you began the operation of the new store?

A. Of our new stores; yes, sir.

Q. This was merchandise that you already had on hand and transferred to the new store?

A. That's right.

Q. Well, now, ignoring that figure, let's refer to the figures which are typed in the exhibit under the column entitled 'Total Purchases', the figure appearing opposite the name of the particular supplier. Those figures total $31,766.01?

A. That's right.

Q. What period of time have you made those purchases and received those shipments?

A. That's purchase from probably February or March.

Q. What year sir?

[fol. 70] A. Of this year. I would say I don't believe there's any invoices in there later than March—I mean, earlier than March.

Q. Down to and including what date, sir?

A. Through the 22nd.

Q. The 22nd of this month?

A. This month; yes, sir.

Am I right on my dates? Yesterday; that's through last night.

Q. Well, now, let's explain for the record just how this list has been compiled. Take the first one, Armstrong Cork Company, Lancaster, Pennsylvania; you have a total purchase of $1,754.17. Does that amount represent one or more than one shipment?

A. That's several shipments; several invoices.

* * * * * *

By Mr. McKee:

Q. And you have totalled, then, the purchases on several invoices and entered the total in this column on the right-hand side?

A. That's right.

Q. That holds true for other suppliers there, does it not?

A. Right, all the way through.

Q. And I believe you've already testified that you have this large invoice file here that's subject to checking these figures against that large invoice file for verification?

A. That's right.

Mr. McRee: Mr. Examiner, with that explanation, we will offer the document as Board's Exhibit 2-A.

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Trial Examiner Fitzpatrick: I understand your position. That objection was overruled.

(The document heretofore marked Board's Exhibit No. 2-A for identification was received in evidence.)

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By Mr. McRee:

Q. Mr. Smith, I hand you this document which has been introduced as Board's Exhibit 2-A (handing document to witness). As I understand your testimony, that document [fol. 71] shows the names of the supplier, the address of the supplier, and the total amount of purchases you've received from that supplier during the year 1947?

A. That's right.

Q. Up to October 22nd.

Now, did you make any other purchases for material and supplies from other suppliers or from—yeah, from other suppliers not shown on that list?

A. Yes, sir.

Q. Can you—have you examined your records and determined the total amount of your purchases during this same period of time?

A. I have.

Q. What is the total of all your purchases?

A. $93,262.10.

Q. That in—does that include the total of $31,766.01 which is shown on Board's Exhibit 2-A?

A. It does; yes, sir.

Q. Does that figure also include the amount of merchandise that you brought over from the old store, the $33,801.92?

A. Yes, sir; it does.

No, I beg your pardon; this is from invoices—it does—merchandise received from distributors also includes inventory bought from old store.

Q. And that $93,000 figure includes not only merchandise that you've received this year, but the merchandise that you had, your stock in your old store that you brought over to the new store?

A. That's right.

Q. Now, do you receive—do you purchase any merchandise from distributors or other suppliers in the State of Tennessee?

A. Yes, sir; we do.

Q. Could you give us the names of the principal suppliers that you purchase from within the State of Tennessee?

A. Yes, sir; in a moment.

J. J. Haines Company.

[fol. 72] Q. J. J. Haines Company. And where are they located, sir?

A. Chattanooga.

Q. And what products do you purchase from them?

A. Armstrong products, Ozite, Mohawk carpeting.

Q. You said something about chrome products, chrome metal.

A. Chrome metal; I believe that's about all.

Q. Now, when you refer to Armstrong products, are you referring to this Armstrong Cork Company?

A. Yes, sir.

Q. Now, that's the same supplier that's listed here on Board's Exhibit 2-A?

A. That's right.

Q. But now, is this shipment here of $1,754.17, your total purchases, was that shipped directly to you from the Armstrong Company in Lancaster, Pennsylvania?

A. From Lancaster and from their other plants. I believe they're shipping now from Jackson, Mississippi. That item represents asphalt tile, which is an Armstrong product, and not handled by J. J. Haines at the present.

Q. Now, where do you receive the materials that you purchase from the Haines Company? How is that delivered to your store?

A. That's delivered by truck from their warehouse.

Q. From their warehouse here in Chattanooga?

A. Yes, sir.

Q. Do you know if any of that material that you've purchased from them, the various suppliers that you've named

here, whether any of that is manufactured within the State of Tennessee?

A. None of it, that I know of.

Q. Do you purchase any material that is manufactured and shipped to you directly from suppliers in the State of Tennessee?

A. Only one account that I know of; that's—want that name?

Q. What's the name of that account, sir?

A. Gilman Paint Company.

Q. Gilman Paint?

[fol.73] A. They're local paint manufacturers and—

Q. Do you know what your total purchases from Gilman was during this period of time which you have testified about?

A. I don't have those figures here. I believe we have them in that briefcase, though.

Q. Could you get that for us?

A. Yes, sir.

A total of $454.01.

Q. With the exception of that one purchase, then, if I understand your testimony, all of your merchandise is received either directly from suppliers outside the State or from distributors within the State who have received the material from manufacturers in other States?

A. Here's a couple of more small items here, which is really not merchandise; it's supplies that were shipped. Here's one from Nashville, and here's one from—

Q. What's the firm in Nashville?

A. The E. A. Lallemand & Son.

Well, now, that's—I have no way of knowing whether or not that is manufactured within the State or not, which I doubt very seriously.

Q. You just don't know about those products?

A. That's right.

Q. Are those figures included in the $454?

A. No, sir.

I beg your pardon; they are.

Q. They are included in that figure?

A. Uh-huh.

Q. You have with you now—you're examining a file that includes all of your purchases locally where you think that

possibly it was manufactured in the State or you don't know that it was manufactured outside the State; is that correct?

A. That's right. That's right; to the best of my knowledge, that's—this is the only accounts we have.

Q. You also maintain and have under your supervision the records showing your sales and deliveries?

A. Yes, sir.

Mr. McRee: Mr. Reporter, will you mark as Board's [fol. 74] Exhibit 2-B a document entitled "Out of State Sales," consisting of three typewritten pages.

(Thereupon the document above referred to was marked Board's Exhibit No. 2-B for identification.)

* * * * * *

By Mr. McRee:

Q. Mr. Smith, I show you a document which has been marked Board's Exhibit 2-B for identification (handing document to witness). I'll ask you to explain for the record what that document is.

A. It's a list of sales, mostly installations; that is, out of the city, or out of the State, I mean.

Q. Do you have—

Trial Examiner Fitzpatrick: Are you going to offer—

By Mr. McRee:

Q. The document shows the date that each sale was made; is that correct, sir?

A. That's right.

Q. And then the name of the purchaser?

A. The address and the amount.

Q. The address and the amount.

Trial Examiner Fitzpatrick: Well, what period does it cover? That's what I want—approximately.

The Witness: From March through the 22nd.

Trial Examiner Fitzpatrick: March 1947 to October 22nd?

The Witness: Yes, sir.

By Mr. McRee:

Q. Do you have with you in the courtroom your original sales records from which that list was compiled?

A. Yes, sir; we do.

Mr. McRee: Mr. Examiner, we offer this in evidence as Board's Exhibit 2-B, with the understanding that Respondents have the right to check this list against the original document from which this list was compiled, original sales records.

Trial Examiner Fitzpatrick: Which are available in the courtroom?

[fol. 75] Mr. McRee: Which are available in court and will be kept in court during the course of hearing for their examination, if they so desire.

Trial Examiner Fitzpatrick: I assume, the same objection?

Mr. King: Yes, sir; if they're admitted in evidence at this time—that is, if this exhibit is admitted in evidence at this time, we make the same objection to it that we did before, that we would first like to see the originals and check them against this particular exhibit.

Trial Examiner Fitzpatrick: Well, they're being offered at this time, I understa d your objection's to the offer; is that correct?

Mr. King: Yes, that's right.

Trial Examiner Fitzpatrick: The objection is overruled and the Board's Exhibit 2-B will be received with the same stipulation as applied to Board Exhibit 2-A; that is, subject to cross-examination by counsel for Respondent, and also an opportunity to check the figures in the exhibit against the original records, which are in court and will be available.

(The document heretofore marked Board's Exhibit No. 2-B for identification was received in evidence.)

By Mr. McRee:

Q. Mr. Smith, I show you—hand you Board's Exhibit 2-B. I'll ask you to state how delivery was made on the sales that you listed on that document. I don't mean to go through each one, but let me ask you this: Do you deliver by your own truck any of your sales that you make at

Watson's Specialty Store (handing document to witness)?

A. Yes, sir.

Q. Do you also, on occasion, ship to—by truck or rail or express to customers who do not reside here in Chattanooga?

A. We do. But I believe this list consists of nothing but installation jobs where we have delivered and installed merchandise. Our records over there will confirm whether [fol. 76] or not they were installed or sold and delivered by some carrier.

Q. You made a check-mark on the third page of that exhibit by the name Olan Mills, which has an address, Birmingham, Alabama, and one above that, Amos Font, Crossville, Alabama. What is your recollection about how those sales were delivered?

A. They were sold and delivered by carriers, trucking companies, to the customer.

Q. Looking over the list, now, from the first page on through, do you see any others which you think were delivered by common carrier?

A. Yes, sir.

Q. You've checked the Mrs. Shields on a little past the middle of Page 1 at Murphy, North Carolina.

A. That was merchandise delivered by a trucking concern.

Q. All right, sir.

A. I believe that covers—in other words, that means that to the best of my knowledge the rest of them were installed jobs.

Q. The rest of them were installed jobs; and how was the delivery made to the customer?

A. With our own truck, and the men installed them.

Mr. McRee: Mr. Reporter, will you mark as Board's Exhibit 2-C for identification a document entitled "Merchandise Shipped Out," consisting of two pages.

(Thereupon the document above referred to was marked Board's Exhibit No. 2-C for identification.)

By Mr. McRee:

Q. Mr. Smith, I'll ask—I'll hand you the document which has been marked Board's Exhibit 2-C for identification

(handing document to witness). I'll ask you to explain for the record what that document is.

A. This is merchandise shipped out of our store to our other stores in various States.

Q. Some of those shipments have been made to other stores of the Ira A. Watson Company within the State of Tennessee?

[fol. 77] A. Yes, sir.

Q. Do you have the original records in court from which this document was compiled?

(Witness nods head affirmatively.)

Q. And they will be maintained here in court for examination by Respondents' counsel during this hearing?

(Witness nods head affirmatively.)

Q. Your answer was, Yes?

A. Yes, sir.

Mr. McRee: Mr. Examiner, with that explanation, we will offer Board's Exhibit 2-C.

Mr. Ward: We have no objection, but that's merely a summary sheet of certain transactions—reserving the right to Respondents to examine some of the items.

Trial Examiner Fitzpatrick: All right, Board's Exhibit 2-C will be received with the understanding counsel for Respondent will have right to examine—have access to the original entries from which the summary was taken.

(The document heretofore marked Board's Exhibit No. 2-C for identification was received in evidence.)

By Mr. McRee:

Q. Mr. Smith, you have testified concerning Board's Exhibit 2-B, which is a list of your out-of-State sales. Have you checked your sales records to determine the total amount of your sales during this period from March 17th to October 22nd?

A. I have.

Q. What is the total amount of your sales during that period?

A. $100,043.15.

Q. Does that figure include the out-of-State sales which are shown on Board's Exhibit 2-B?

A. Yes, sir.

Q. Does it include the merchandise shipped out to the other stores of the Ira A. Watson Company, which is shown on Board's Exhibit 2-C?

A. It does not.

[fol. 78] Q. It does not?

A. No.

Q. Mr. Smith, you've testified about this installation work that you do. How many men did you have employed in the installation department in August of this year?

A. Eight.

Q. Eight employees?

A. Yes, sir.

Q. Now, how many other employees does the store have, in addition to these installation men, or did they have at that time?

A. About eight or nine. Eight or nine.

Q. You have a total, then, of—

A. Of 18—16.

Q. 16, 17, in the store?

A. Right.

Q. You also operate one or more than one truck?

A. Operate two trucks.

Q. Two trucks.

Who drives those trucks when merchandise is delivered to customers?

A. Our own mechanics.

Q. Well, are those—who do you mean by 'mechanics'? Are they part of the installation crew?

A. They are the installation crew, yes, sir. Part of it; yes, sir.

Q. So these same men who are working on the installation also deliver the merchandise to the customer's residence or the customer's place of business?

A. Right.

Q. Mr. Smith, have you had any sales and installation jobs at manufacturing concerns or at places of business engaged in the transportation in interstate commerce, such as bus stations, railroad stations?

A. Yes, sir.

Q. In inter-state commerce?

A. Yes, sir.

Mr. McRee: Mr. Reporter, I'll ask you to mark as Board's Exhibit 2-D for identification a document consisting of [fol. 79] two pages, entitled "Manufacturers And So Forth".

(Thereupon the document above referred to was marked Board's Exhibit No. 2-D for identification.)

By Mr. McRee:

Q. Mr. Smith, I hand you the document which has been marked Board's Exhibit 2-D for identification (handing document to witness), and ask you to explain for the record what that document is.

A. That's a list of what we term as commercial jobs, manufacturers and, as you stated, bus stations.

Mr. King: Can't hear you over here.

Trial Examiner Fitzpatrick: Speak up.

Read the answer up to this part.

(Answer read.)

By Mr. McRee:

Q. Are you familiar with those businesses listed there?

A. Yes, sir.

Q. Are they all situated here in Chattanooga?

A. These are all in Chattanooga; yes, sir.

Q. With the exception of the Greyhound Bus Station, which is the last one named on the first page there, are all of those companies engaged in some type of manufacturing?

A. That's right.

Q. And do you know whether those—those companies ship their products in interstate commerce?

A. I don't know that; no, sir. I wouldn't—

Mr. McRee: We offer this, Mr. Examiner, with the—

By Mr. McRee:

Q. Are these records from which this list was compiled in court?

A. That, I don't know. No, they're not; they can be had, though; they're not here.

Q. You can get them here, though?

(Witness nods head affirmatively.)

Mr. McRee: We'll reserve offer, then, Mr. Examiner, [fol. 80] until we get these original documents from which this list was compiled in court for a check.

Mr. King: Can't you offer it now, subject to—

Trial Examiner Fitzpatrick: You can offer it.

It will be received, subject to the rights of the check.

Mr. McRee: All right, sir; we'll offer it, then, with the understanding that during the course of the hearing we'll have the original records from which that list was compiled in court for checking by the Respondents' counsel.

Mr. Ward: Very well.

Trial Examiner Fitzpatrick: Very well. It will be received, subject to the right of counsel to check the original documents as to the authenticity and cross-examination upon it.

(The document heretofore marked Board's Exhibit No. 2-D for identification was received in evidence.)

* * * * * *

By Mr. McRee:

Q. Mr. Smith, what was your first contact with Jack Henderson or any other representative of the Respondent Union?

A. During the remodeling of our new store, which was, I think, some time in February, some—

Q. This year?

A. Yes, sir.

Some argument came up between carpenters working in this new store and one of my men.

Q. You mean one of your installation—

A. One of my linoleum men, in other words. And that same afternoon, Mr. Henderson was called into the picture by the carpenters. He talked with them, came over to me next door and apologized for it.

* * * * * *

By Mr. McRee:

Q. Just briefly, tell us, now, what your contacts with and your dealings with Mr. Henderson were in February 1947.

A. Well, on the same afternoon, as I stated before, he

came over to me and apologized very nicely for the conduct of this carpenter.

[fol. 81] Mr. King: Can't hear you over here.

Trial Examiner Fitzpatrick: Speak up so they can all hear.

A. (Continuing) And at that time he stated to me that our men were doing work that should be in the—they should belong to his Union. So, I believe at that time he talked to one of the boys.

By Mr. McRee:

Q. One of your men?

A. Yes, sir.

Mr. King: Well, I object to what he believes, unless he saw—

Trial Examiner Fitzpatrick: Just tell what you know.

The Witness: Well, the next day or—Mr. Henderson came back and we—I granted him permission to have a meeting in our store and talk to the boys, which this meeting was held. Mr. Henderson asked me to be present, which I did, or was, and—

By Mr. McRee:

Q. Just very briefly, now, tell us what happened at that meeting.

A. Mr. Henderson talked to the boys and the boys, in turn, had questions to ask him; some of them, he answered, and some, he did not, saying that he would have to look into it a good little further or something. The next morning my boys met me at the door—

Q. Just let me interrupt you there just a minute.

Now, you say Mr. Henderson talked to the boys and they asked him questions. Just what was the general nature of the talk? What was the subject?

A. Oh, of course, Mr. Henderson was trying to show them the advantages of the Union.

Q. Joining the Carpenters Union?

A. What the Union could do for them.

Q. When you say Mr. Henderson, you mean Mr. Jack Henderson, the man sitting here at the end of the table?

A. That's right.

Q. Business Agent of the Local 74.

Go ahead, sir.

A. The next morning, my boys met me at the door and said that they had thought it over and that they did not [fol. 82] want any part of the Union. I at that time told them that that was up to them, that I had nothing to do with it. What they did was—was strictly up to them. And then maybe a day or two later, Mr. Henderson came back to me and—

* * * * * * *

By Mr. McRee:

Q. I don't mean exact words, but what—just in substance, what did the contract provide?

A. Well, my understanding at the time was that it was closed-shop contract. It was before the State Law was—closed-shop State Law was passed.

Mr. McRee: I don't think there's any use to proceed any further, Mr. Examiner; that's admitted in the Answer, closed-shop contract.

By Mr. McRee:

Q. Well, after you failed—or the Company failed or refused to sign this contract, what, if anything, did the Union do then?

A. Mr.—the rest of the meetings, as I said before, were held with Mr. Griffis, Mr. Henderson and other members of the Union, and that—the next important step was pickets in front of our place.

Q. Do you know about when that was when it started?

A. I'd say latter part of—sometime, latter part of March.

Q. Where is your store located?

A. 616 Broad Street.

Q. Are you in the business section, the main business section of Chattanooga?

A. Yes, sir.

Q. When this picket first appeared on the scene, did he carry any sign, placard?

A. Yes, sir.

Q. Do you remember what that sign stated?

A. "This Store Unfair to Organized Labor, Carpenters Local 74, A. F. of L."

Trial Examiner Fitzpatrick: Did you say picket or pickets?

[fol. 83] The Witness: Pickets.

Trial Examiner Fitzpatrick: Pickets.

The Witness: Two, they've got.

By Mr. McRee:

Q. Were there two at the same time, or one relieve the other?

A. One relieve the other.

Q. Just one picket there on any—at a time?

A. They were both on the job all the time, only one carrying a sign.

Q. I see.

Now, was that sign ever changed?

A. Yes, sir.

Q. About when was that?

A. Around July the 14th or 15th; the next day after the Chancery Court case ended.

Q. Around the middle of July. And what did the sign read after it was changed?

A. "This Store Employs Non-Union Labor," signed by the Carpenters.

Q. Carpenters, Local 74?

A. Yes, sir.

Q. And how did the pickets continue to carry this second sign—how long did this picketing continue?

A. Until the latter part of August.

Q. About what date in August?

A. Around the 27th or 30th.

Mr. Ward: Could we have that more explicit?

By Mr. McRee:

Q. Do you remember the exact date that it stopped?

A. I don't. I was under the impression it was on—on a Wednesday at noon, which I believe would be around the 27th or 28th.

Q. Of August?

A. They left. Yes, sir.

Q. During this entire time, now, that this picketing went on—I withdraw that question.

Do you know a man named Stanley?

A. Yes, sir.

[fol. 84] Trial Examiner Fitzpatrick: (Spelling) S-t-e-n—

Mr. McRee: (Spelling) S-t-a-h-l-e-y.

By Mr. McRee:

Q. Did your Company ever enter into any contract with Stanley?

A. We did; yes, sir.

Q. Do you know—you still have the original of that contract?

A. No, sir; that's filed in—I believe in Judge Darr's Court. I'm not sure.

Mr. McRee: Mr. Reporter, will you mark as Board's Exhibit 3 for identification a one-page document dated August 15th, 1947, purporting to be a copy of a letter to George D. Stanley—George Stanley from A. D. Smith.

(Thereupon the document above referred to was marked Board's Exhibit No. 3 for identification.)

By Mr. McRee:

Q. Mr. Smith, I show you a document which has been marked Board's Exhibit 3 for identification (handling document to witness). I'll ask you if that is a copy of the contract, agreement you, as Manager of Watson's, entered into with Mr. George Stanley.

A. It is: yes, sir.

Mr. McRee: Mr. Examiner, we offer that document as Board's Exhibit 3.

Mr. King: I want to reserve any objection until I have had an opportunity to cross-examine the witness.

Trial Examiner Fitzpatrick: Any objections made at this time on—if I understand that is an objection, overruled. Board's Exhibit 3 will be received.

(The document heretofore marked Board's Exhibit No. 3 for identification was received in evidence.)

By Mr. McRee:

Q. Mr. Smith, after you entered into this agreement with Mr. Stanley, did your men—did you send your men to his residence to perform any work, services there?

A. Yes, sir.

[fol. 85] Q. Do you know what day they started that work, the day you first sent the men?

A. They started on a Sunday, which was the 17th, I believe.

Q. Of August?

A. Yes, sir.

Q. How long did they continue to work out there on that occasion?

A. We had two men working Monday, Tuesday and Wednesday; in other words, up to the morning of the 21st.

Q. Who were those two men?

A. Dennis Pozzuto and H. W. Bullard.

Q. And H. W. Bullard?

A. Yes, sir.

Q. Did you deliver to that residence any material, merchandise, in conformance with this agreement with Stanley?

A. Our trucks were there several times from Monday morning on through the 20th.

Mr. Ward: May we have the dates—

Mr. McRee: Started to work on the 17th, worked on till the morning of the 21st.

By Mr. McRee:

Q. Just tell us what happened, now, on the morning of August 21st.

A. Around 8:00 or 8:15 in the morning, Mr. Parker—

Q. Who is Mr. Parker?

A. Contractor on the job.

Q. Is that B. F. Parker?

A. Yes, sir.

Called me and asked me if I'd help him out. I told him I'd be glad to if I could. He says, "Well, I'm about to have trouble out here on this Stanley job." He says, "I'm going to ask you to pull your men off." I said, "Well, is Mr. Stanley there?" He said, "No, he's not here, but I would appreciate it if you'd pull your men off, because if you don't, we'll definitely have trouble today. I almost had it yesterday." So I told him that in order to keep down any trouble, I would pull them off. I asked [fol. 86] him if any men were there and he said one man was there, and I asked him whether he'd talked to him.

Q. Which one of them was it?

A. Pozzuto. Pozzuto came to the phone and I told him to come in to the store, and it so happened that Bullard was sick and did not show up on the job; the one man was all I had.

Q. And did Pozzuto come in, as you'd told him?

A. He did.

• • • • • •

A. Mr. Parker called me late the same afternoon and says, "Smith, you can come on out here and finish the job now." I says, "What's wrong?" He says, "Well, nobody left on the job." And I asked him what was the trouble and he told me that they had come out and pulled all the men off of his job.

Q. Did he say who had come out?

A. The Union had come out and pulled the men off the job.

Q. And did your men go out—when did they go out there next?

A. Some three or four days later.

Q. And were any of the carpenters, Parker's crew, working out there at that time, do you know, or not?

A. When we went back?

Q. Yeah.

A. No, sir; so far as I know.

Trial Examiner Fitzpatrick: Did your men at that time complete the job that they were supposed to do; is that your testimony?

The Witness: We returned three or four days later and did complete the job.

• • • • • •

Mr. McRee: Let me correct my question; I meant in August of this year, this past August.

The Witness: They are paid on a salary and yardage basis or square-footage basis.

By Mr. McRee:

Q. In other words, they get sort of a piece-rate pay on [fol. 87] these jobs that they work on; is that correct, sir?

A. That's right; they do have a guaranteed salary.

Q. I believe you've testified that practically all of your sales of inlaid linoleum and asphalt tile and all that, you include the installation of those products?

A. Yes, sir.

• • • • • •

Cross examination.

• • • • • •

Mr. King: The witness hasn't answered yet. I asked him to name the date that they quit working.

Trial Examiner Fitzpatrick: You state your question, Mr. King.

The Witness: We started on a Sunday and worked through the 20th.

By Mr. King:

Q. Through the 20th?

A. Yes, sir.

Q. All right. And that was—

A. The morning of the 21st, the boys did not go to work. They showed up on the job, but did not go to work.

Q. Do you recall how many hours you worked on Sunday, your men?

A. No, sir; I don't have those records here, and I do not.

Q. Could you—could you get your records and show how much work was completed on Sunday?

A. Couldn't show how much work definitely, no.

• • • • • •

By Mr. King:

Q. I'll ask you, Mr. Smith, if at any time you have sold any of the items that you have furnished labor with, have you sold any of that material to contractors, to individuals or anyone without furnishing the labor?

A. Just recently, we have.

Q. Uh-huh. And when did you begin doing that?

A. I'd say it is—in quantity, that is, now—in the last 30 to 60 days.

[fol. 88] Q. And what were those items; that is, just—the material?

A. Linoleum, asphalt tile and rubber tile.

Q. Now,—and you say that prior to that 60 days ago, that you did not sell material without putting it down yourself?

A. In any quantity, we did not. A man come in, wanted four or five feet of linoleum, we tried not to turn him down.

Q. How large a quantity did you sell without labor or would you sell without labor prior to this 60-day period?

A. The merchandise now is beginning to loosen up to where I would consider most any kind of a deal now, furnishing materials.

Q. You mean, sell to anybody?

Well,—

A. Provided I can get the merchandise.

Q. Wasn't some of this material ordered by Mr. Stanley, Mr. Parker and Mr. Stanley's wife material that you say you just loosened up on in the last 60 days?

A. I believe there was some rubber on his job. If so, we are selling rubber.

* * * * * *

By Mr. King:

Q. I believe you testified that—that the job was shut down, somebody told you about it, that your men were sent back. You got a call, telephone call from Mr. Parker.

A. Mr. Parker told me on the afternoon of the 21st it was all right for me to come back.

Q. What did you do after you got that information?

A. Our schedule was full—I mean, we could not get back there for another three or four days, and as soon as we were able to get men back on the job, we went back and finished it.

Q. Now, you say that your schedule was full and you couldn't get back on this job, the Stanley job; is that it?

A. That's right.

Q. But you did get back to finish it in how long?

A. You mean, how long did it take us to finish it?

Q. Yeah.

[fol. 89] A. It took us, if I remember correctly, another three or four days after we did get back on the job.

Q. When did you—when did you get back?

A. I don't remember.

Q. Well, was it a week or a day or a month?
A. Three or four days.
Q. Three or four days?
A. After the 21st.
Q. You finished it along about the 30th, then, is that it? As a guess, your best judgment?
A. I think it took us another three or four days to finish it.

* * * * * *

Re-direct examination.

* * * * * *

Q. Did you ever have any discussion with him or did your assistant, to your knowledge, ever have any discussion with him about material without the installation cost?
A. Mr. Stanley probably tried to buy the material, yes; however, I'm assuming that he did. But at that time, we were not selling quantities of this material.

* * * * * *

Q. Say, up until August the 21st, if I understand your testimony, had you sold any substantial—or any quantity purchases of any of this material without including the installation in the job?
A. No, sir.
Q. Did you start making those quantity sales before or after August the 21st?
A. It's only one sale that we've made before that time that amounted to anything, and that's about a $300—$330 worth of asphalt tile shipped to Murphy, North Carolina, without installation. And—

* * * * * *

Re-cross examination.

By Mr. King:

Q. With reference to the sale of this material, where was this material when Mr. Stanley came in to order it or look at it?
[fol. 90] A. On the sales floor.
Q. On the floor?
(Witness nods head affirmatively.)

Q. In other words, you had it ready to start the job whenever he was ready?

A. Yes, sir.

Q. And therefore, this material, having been shipped, was already on your floor and unpacked and opened for re-sale; is that correct?

A. Some of it he bought from samples of the stock in the stockroom; yes, sir.

Q. Well, now, the question was—you said, Yes—I asked you if you had the material there and could have started the job immediately if he was ready, and you said, Yes. Now, do you want to retract that or is that correct?

A. No, that's correct.

Q. That's correct.

So that, as far as shipping it in, it had already been shipped to your store, received by your store, unpacked by your store and was on the floor at the time you made the sale; is that correct?

Mr. McRee: I object to that. That's five questions in one.

* * * * * *

Trial Examiner Fitzpatrick: You can answer it.

A. Yes, sir.

* * * * * *

Re-direct examination.

* * * * * *

By Mr. McRee:

Q. Mr. Smith, these pickets that you described on direct examination before the—before you were turned over for cross-examination, those—who were those pickets? Were any of them employees of your store?

A. No, sir.

Q. Did any of the employees—or did employees of your store engage in this picketing?

[fol. 91] A. Never.

Q. Do you know who these men were who did the picketing?

A. I don't know their names and I never saw them until they were in front of the store with their signs.

* * * * * *

George D. Stanley, a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Fitzpatrick: Take a seat.

Your name, please?

The Witness: George D. Stanley.

Trial Examiner Fitzpatrick: (Spelling) S-t-a-n-l-e-y?

The Witness: That's right.

Trial Examiner Fitzpatrick: Proceed, Mr. McRee.

Direct examination.

By Mr. McRee:

Q. Mr. Stanley, where do you reside?

A. Owahacha Pike, outside of Chattanooga.

Q. And were you subpoenaed to come here and testify?

A. I was.

Q. About when did you purchase that residence at—on Route No. 4, Chattanooga?

A. July the 31st of 1947.

Q. And after you purchased that, did you enter into a contract with a man named Parker to make certain repairs and remodeling on that residence?

A. I did, yeah.

Q. Do you have your copy of that contract?

A. I have it in my files.

Q. You don't have it with you?

A. No.

Mr. McRee: Since the allegation concerning the contract is admitted in the—in the Answer, Mr. Examiner, why, I assume there's no objection to the introduction of a copy.

Mr. Reporter, will you mark as Board's Exhibit 4 for identification a document consisting of three pages, entitled "Building Agreement," the second page purporting to be—[fol. 92] show that the original document was signed by B. F. Parker, George D. Stanley, and witness, R. S. Freeman.

(Thereupon the document above referred to was marked Board's Exhibit No. 4 for identification.)

By Mr. McRee:

Q. Mr. Stanley, I'll ask you if that's a copy of the Building Agreement or contract that you signed with Mr. Parker (handing document to witness.)

A. Yes, that's a copy of it.

. . . . . .

Mr. King: I stated to counsel for the Board that if this copy that is being presented here now is a true and correct copy of that original that's been filed, then we have no objection to it.

Trial Examiner Fitzpatrick: Board's Exhibit 4 will be received subject to checking, if any party desires, against the original which, I understand, is filed in the District Court as an exhibit, presumably, in the injunction proceedings.

(The document heretofore marked Board's Exhibit No. 4 for identification was received in evidence.)

. . . . . .

By Mr. McRee:

Q. Mr. Stanley, after entering into this contract which has been introduced as Board's Exhibit 4, did you go with Mr. Parker to various supply houses in shopping for materials and supplies that were going to go into the remodeling job?

A. I did.

Q. And was one of the things you were looking for floor and wall coverings for your bathrooms and kitchen?

A. That's correct.

Q. And did Mr. Parker accompany you on your shopping expedition, so to speak, for those materials?

A. He did.

Q. Did you go to any other—go to any place before you went to Watson's?

A. I did.

Q. Do you remember about how many places you went to?

[fol. 93] A. About four other places.

Q. And did you find the type of material that you were looking for?

A. I did not.

Q. And do you remember about what date it was you went to Watson's the first time?

A. I don't remember the exact date, but it was—the best I could recollect—around the 13th or 14th of August.

Q. And who was with you at that time?

A. Mr. Parker was with me—you mean, when I went to Watson's?

Q. Yes, sir.

A. Mr. Parker was with me, and my wife; just the three of us.

Q. And did you find the sort of material there that you wanted?

A. Found just what we'd been looking for.

Q. And did you later sign, as approved, this contract to—or offered agreement that the Company sent to you? I show you Board's Exhibit 3 (handing document to witness). Of course, that's just a copy.

Trial Examiner Fitzpatrick: Will you read that last question, please.

(Question read.)

A. I did.

By Mr. McRee:

Q. How many trips did you make to the Watson establishment, Mr. Stanley, the best of your recollection?

A. Oh, four or five, I'd say.

Q. And how many of those occasions did Mr. Parker accompany you?

A. I believe he just went with me the first time; the other times were to select designs, and to be sure that the color combinations were exactly what we wanted.

Q. Do you recall when Watson's men began working on your residence?

A. Yeah.

Q. Do you know what day of the week it was on, what day of the month?

[fol. 94] A. They started on a Sunday and I'm not positive of the date.

Q. Was that the Sunday prior—

A. But it was the Sunday following the signing of the contract.

Q. The next Sunday following the signing of the contract?

A. That is correct.

Q. And at that time—let's say prior to that time, did Parker have men working on this remodeling job?

A. Yes.

Q. About how long had he been engaged in work on that job?

A. He started on Monday, one week prior to the starting of the installation, to the best of my recollection.

Q. He'd been working about a week, then, before the Sunday Watson's men came on?

A. Started on Monday, and I believe Watson's men started on Sunday, the following Sunday.

Q. Were any of Parker's men working that Sunday that Watson's men started?

A. Parker himself was present and he helped them get started.

Q. And how long did Watson's men continue to work on the job on that occasion?

A. They worked along until they were—until Parker ordered them off. But they didn't work every day; there would be a day or two, there'd be a day break perhaps, in there, just the best of my recollection. I didn't—Mr. Freeman is present and he'll be on the witness stand and he has the dates, I believe.

Q. Is that Mr. R. S. Freeman?

A. Yes, I—he kept the payroll records, but I'm not positive whether he kept records on Watson's men, because theirs was a contract rather than a cost-plus.

Q. Was—just what was Mr. Freeman's connection with this job?

A. Well, he was my assistant to look after payroll and pay the help and to go with Parker to buy materials when [fol. 95] I wasn't available and make decisions that I didn't feel that it was necessary for me to be on.

Q. And did he stay on the job from the time it started until it was completed?

A. He did.

Q. That's Mr. R. S. Freeman?

A. That's correct.

Q. When you went with Parker to the Watson Store, was there any conversation at that time about the Union?

A. There was.

Q. Who started that conversation, Mr. Stanley? What—just in substance, what was said?

A. Mr. Parker—the substance of what was said was that, "Don't go there to buy your material, because we'll—our men won't work with them."

Q. You mean, Parker told you that before you went to Watson's?

A. Before I went to Watson's he said that "The Union men are not going to work with their men; there'll be trouble."

Q. Did he tell you at that time his men—his carpenters were members of the Respondent Union?

A. He did.

Q. And did you have any other conversation with him about that before you actually went to Watson's on that first occasion?

A. I didn't go to Watson's until we had been to every other place that Parker and I could think of. We didn't—we knew—I mean, Parker told me that he would rather I didn't buy the material from Watson's.

Q. Uh-huh.

A. And I had no objection to buying it somewhere else; in fact, I preferred to buy it from a place that suited Parker. And I made every effort to do that, and I went to Watson as a last resort and Parker went with me, and it was with the understanding that the work was to be done after his men finished or on Sundays or at night, and that was the condition under which Parker agreed to let Watson do the work.

* * * * * *

[fol. 96] By Mr. McRee:

Q. While you were in Watson's Store with Parker on that first occasion, was there any discussion while you were present about the Union?

A. There was.

Q. And who started that conversation?

A. Parker.

Q. And who was he talking to?

A. Mr. Moore, one of the men in the store there.

Q. Just tell us, in substance, what that conversation was.

A. It was such a long one that I got tired of listening

to it and I went to looking at materials, but it was a hot argument about why they didn't join the Union.

* * * * * *

Q. When you were in the store with Parker, what discussion did you have about when Watson's men would do the work on this job?

A. It was agreed between Parker and myself and Mr. Moore that they would start on Sunday and try to work it at night or after his men were off the job.

Q. Was that before or after you signed this contract?

A. Before I signed the contract.

Q. And was the contract even signed that day?

A. No, it wasn't. In fact, I didn't consider it a contract. I asked him to put in the letter the same statements that he told me as to price, and he wrote the letter, and I said, "When you write the letter I'll approve of it." And when he did write the letter for me, why, a day or so later I dropped in and he handed it to me and I signed—approved of a copy, to the best of my recollection.

Q. All right, sir.

And now, they did start to work on Sunday?

A. Yes, they did.

Q. Now, I don't know whether I've asked you or not, whether Parker's men were working on Sunday.

A. None of Parker's men were working that Sunday, just Parker.

[fol. 97] Q. Did Watson's men come out and work the following day, Monday?

A. No, they did not.

Q. Do you recall when they next worked?

A. I couldn't recall the exact date, but there was several days elapsed and finally,—

Q. Mr. Freeman get up that?

A. I might have that information. I purposely had him keep the records on payroll time. I didn't bother with keeping it.

Q. I see.

A. I had a lot of other things to do.

Q. Were you present at the residence on the 21st of August? That is, I think that was on a—on Thursday, I think it was, of that week after they started.

A. On the 21st of August?

Q. 21st of August.

A. Yes, I was present late in the afternoon, about 3 o'clock.

Q. When—about what time did you get out there that day, do you recall?

A. Some time after lunch.

Q. Some time after lunch.

Were Watson's men working at that time?

A. They were—oh, wait a minute. Which—on the 21st? I beg your pardon.

Q. Yes, sir.

A. No, they were not working that day.

Q. Did Mr. Freeman, your agent there on the job, make any report to you about where Watson's men were, why they were not working?

A. Yes, he told me that Parker had ordered them off the job.

Q. And on that same day, now, August the 21st, did you see Mr. Jack Henderson, the man sitting here at the end of the counsel table?

A. I did.

Q. And where did you see him?

A. I saw him when he drove up in the car. I didn't know [fol. 98] him, but he—I first saw him drive up in the car with another gentleman.

Q. And did you meet him and talk to him on that occasion?

A. I did.

Q. And who all was present at that time?

A. Mr. Parker was present and the gentleman that was with him—I don't recall his name.

Q. Gentleman with Mr. Henderson?

A. Yes. He had a gentleman with him. I believe he's in the courtroom here, but I don't recall his name; I don't believe I was introduced to him. But there was some of the workmen there; I don't know which ones they were, but some of them came out of the house about the time he drove up. I don't know whether all of them or part of them, but I know some of them, some of the men, workmen that Parker had employed on my house.

Q. Just tell us, to the best of your recollection, now, what conversation you had with—let me withdraw that question.

Before you talked with Mr. Henderson on that occasion,

did he make any statement to the employees, the carpenters working there in Parker's crew?

A. Before I talked to him?

Q. Yes.

A. I don't know what statement he'd made before I talked to him; he'd talked to Parker and his men there before, and Parker called me over to meet him.

Q. I see.

A. I purposely didn't go over there because I wasn't invited; I thought maybe it was someone that he came up to talk to Parker and I had something else to do, and I didn't—until Parker called me, I didn't even go over to where they were.

Q. Well, now, after you went over there, just tell us to the best of your recollection, Mr. Stanley, just what was said and what happened.

A. Well, Parker told me that the—they were calling the men off the job on account of Watson's men and—

Q. Did he introduce Mr. Henderson?

[fol. 99] A. He introduced me first and told me that Mr. Henderson was representing the Carpenters Union and that they had decided to call the men off of the job because of the Watson men.

Q. Did you then talk to Mr. Henderson about this matter?

A. I did.

Q. Just tell us, the best of your recollection, nov what was said in that conversation.

A. Well, it's hard to remember each word, but—

Q. The substance of it.

A. The sum and substance of it was I asked him why it was the men wouldn't go on and finish my job, that I had—was very anxious to get into my home and gave him a number of reasons why that it was urgent, and he told me that his men would not work with non-union men. He told me that he wasn't telling me that I couldn't hire non-union men, but he was telling me that his men were not going to work with non-union men. Then I explained to him that Parker had already run the Watson's men off of the job the day before and that I hadn't made any objection to it and that I didn't want non-union men to begin with; I only took them because Parker and I couldn't find the material anywhere else. And he said that I knew that Watson's was being picketed before I went in there to buy

the material. I says, "Well, your men are gone and Watson's isn't here; why don't you let your men finish it?" He said, "Because we believe that you will re-employ Watson's men after we finish it if I let my men finish it. Pack up your tools and get off the job. That's my orders."

Q. You mean he told that to you or to someone else?

A. To the men. The men were, by that time, around behind, listening, or out front where he was.

Q. About how many were working that day, do you recall?

A. Oh, perhaps six.

Q. Mr. Freeman have the record on that?

A. He has. I'm not positive as to the number. I know there were some floor sanders and two—two carpenters, [fol. 100] either—and I'm not positive whether the painters were there then or not, but four to six men.

Q. And just go on now. Did you have any other conversation?

A. That was about the limit of the conversation. I tried to—as I say, I can't remember word for word.

Q. Uh-huh.

A. I put up as good a plea as I could to show why I needed to get in the house, and told them that I wanted Union men and had always enjoyed having Union men working, preferred them because I thought their work was better, and that Parker—it was my understanding with Parker that Union men were going to do the work and that I certainly didn't mind having Union men do it if I could possibly find material for my floor covering and walls. And —but I was at a loss to understand why the material was not available at any store that I went to, and I went to the leading stores and I went to every place Mr. Parker took me to and he was a contractor and he knew where to go, and they had imitations but they didn't have the kind of material that we wanted. And Mr. Henderson said that he could find material for me and Union men to lay it. Well, I told him I would like to know where, and he said he thought I could try—get it in Atlanta, and I told him we had called Atlanta and we were unable to find it. And some of his men, I believe one of the sanders—don't know his name—said that's what he couldn't understand, Watson had the material and the Union people didn't have it. And

Mr. Henderson said, "I think I know the reason for that," and that's as far as I remember, that's about the sum and substance of the conversation. Henderson was very definite that the men were not going to work. I did say that —"Do you expect to control my actions for the rest of my life if—when you say that your men—I might hire Watson's men if you do the job without them?" and he didn't answer me. He just went on, told the men to pack up, get their tools, that the job was—get off the job.

Q. Was there any mention made of your contract with Watson?

[fol. 101] A. Did he what?

Q. Was any mention made about your contract with Watson?

A. Oh,—yes, he did. I—he—I did ask him under what—what would I have to do, then, to get the job finished. Parker had sent the men off the job and—

Q. Which men are you talking about now?

A. Watson's men. I said, "Parker has sent the non-union men off the job, and I want it finished, and I'm desperate to get it done," because I had hired Parker because he had a reputation of getting things done in a hurry and knowing where to get materials—that's the recommendation I got on him—and I said, "Just what will I have to do? I'm willing to do anything to get into this house. I haven't a place to live and I've paid for this house and my wife's health is in bad condition and we need to get in." And he said, "Go—if you cancel your contract with Watson and get Union men to to your job, we'll go back to work."

Q. Did the men pack up and leave after that?

A. They did, in about an hour after he left.

Q. Did—that was on the 21st. Now, the next day or any time after that, have you ever talked with Parker about getting these men to come back?

A. I talked to him every day for about two weeks.

Q. What did he tell you?

A. Night and day.

Q. What did he tell you, if anything?

A. Oh, he was going to have someone out there; he was the best at making excuses I've ever met, and the best-natured one.

Q. Did he ever come back out with the crew to finish the job?

A. He did not.

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[fol. 102] Cross examination.

• • • • • •

Q. What kind of a house is it, or was it when you bought it?

A. It's—do you want to know what construction?

Q. Private residence?

A. Yes, it's a residence, private residence.

Q. How many rooms in it?

A. About ten rooms.

Q. Had it been occupied as a private residence when you bought it?

A. It had been before I bought it.

Q. And you purchased it with the idea of occupying it as a private residence?

A. I did.

Q. Exclusively?

A. I did.

Q. Just for your family—you and your family?

A. That's correct.

• • • • • •

The Witness: Parker was thoroughly in agreement—

By Mr. Ward:

Q. No, I'm asking you what that contract covered. Parker was supposed to supply all the workmen needed; is that true?

A. It was his job to supply workmen.

Q. It's either true or it isn't. Isn't it so that the contract speaks for itself? It's a contract you entered into, and Parker was supposed to supply all the workmen needed; is that right?

A. I believe that's right.

• • • • • •

By Mr. Ward:

Q. You had the privilege of what?

A. I think I had the privilege of selecting material.

Q. The privilege of selecting workmen?

A. I had the privilege of selecting workmen if Parker approved of it, and he did approve of these workmen.

[fol. 103] Q. Did Mr. Parker approve of the workmen that Watson sent out there?

A. He approved of Watson sending their men out. I don't think he selected which one was to come, because I don't think he knew them.

Q. Did you ever have any conversation with Mr. Parker about Watson's employees?

A. Yes.

Q. What did Mr. Parker tell you?

A. He told me he'd rather have me buy material somewhere else?

Q. Why?

A. Because they were non-union.

Q. In spite of that, you bought the material from Watson?

A. After going every place else that Parker was willing to take me and several that I went to—

* * * * * *

By Mr. Ward:

Q. Now, what was your first knowledge of any difficulty on the job? How did you hear about it?

A. Mr. Freeman informed me.

Q. What's that?

A. Mr. Freeman, my man who was keeping the time, keeping records.

Q. Yeah.

A. Told me there'd been some conversation among the workmen the day before.

Q. What day is this?

A. The day before, I believe, that Mr. Henderson—the best I can recollect, it was the 21st that Mr. Henderson came out, and I believe it was on—it would be the 20th, the day before he came out, that Mr. Freeman told me there'd been some conversation among the men and they

had finally decided to go on work. They discussed that, the working with Watson's men, discussed—

Q. When was that?

A. To the best of my recollection, it was the 20th, the day before Mr. Henderson came out to see the men.

[fol. 104] Q. Mr. Freeman notified—told you about—discussed with you some difficulty?

A. Discussed with me that the men had—

Q. What men?

A. Parker's men.

Q. What did he say to you?

A. He said that they had discussed whether or not they should continue on working with Watson's men there.

Q. What did you tell him?

A. I didn't tell him anything.

Q. Just listened to what he had to say?

A. I did.

Q. What happened then?

A. Nothing happened that day; they continued to work.

Q. That was the 20th of August?

A. They continued to work until the time for them to quit, came back to work the next day as usual.

Q. What happened then, the next day?

A. They worked until Mr. Henderson came out.

Q. Who worked?

A. All of the men that Parker employed.

Q. Were Watson's men there, too?

A. That's the day Parker ordered Watson's men out, I believe. I'll again have to refer—

Q. Watson's men there on the day—they were working on the 21st of August? The answer's 'yes' or 'no', isn't it?

* * * * * *

Trial Examiner Fitzpatrick: The witness isn't making a speech.

Will you find the question.

I don't think it's necessary. I understood that the question was whether or not you knew, on August 21st, or you can testify that Watson's men were on the job.

The Witness: I could not.

Trial Examiner Fitzpatrick: Is that your question?

Mr. Ward: That's right.

The Witness: I came on the job myself the afternoon [fol. 105] of the 21st and Watson's men were not on the job.

By Mr. Ward:

Q. They were not on the job?

A. That's correct.

Q. Were Parker's men there?

A. They were.

Q. Were they working?

A. They were.

Q. What happened, then, on the afternoon of the 21st, when you went out there?

A. Parker told me that he had run Watson's men off the job.

Q. Parker told you that?

A. That's right.

Q. That Parker had run the men off?

A. That's right.

Q. He's your general contractor, isn't he?

A. He was the contractor, yeah.

Q. Well, under this contract, Parker had supervision of those men, didn't he?

A. I—I imagine so. That was his job, to hire them and supervise the work.

Q. But Parker told you he had run them off?

A. That's right.

Q. What did you do? You were right on the job—

A. I didn't object to it. Parker was the one who ordered them on and I didn't object to him ordering them off. I just objected—I had nothing, no choice in the matter. I expected, to begin with, to have to wait, and so I decided I'd have to wait till his men finished the work, the other—the carpentry work.

Trial Examiner Fitzpatrick: By 'his' men, you're refer-ing to—

The Witness: I'm referring to the men that Parker—Parker—carpenters, the men that were working direcily under Parker.

Trial Examiner Fitzpatrick: Not the Watson's men; Parker's?

The Witness: That's right.

By Mr. Ward:

Q. On the afternoon of the 21st, you say Watson's men [fol. 106] were not working; Parker had run them off the job. Was Parker's employees working then, when you went out?

A. They were.

* * * * * *

A. What did I talk about?

Q. Yeah.

A. About my work.

Q. Well,—

A. How anxious I was to get my house finished and how unfortunate it was that I should be put in the position that I had been thrown into; felt that I was not at fault in any way, that it was rather unfortunate thing that the controversy had come up. They sympathized with me and they took up their tools and left about the time they usually left; they started getting their tools ready at the time Mr. Henderson told them to pack up and leave.

Q. Who told them?

A. Mr. Henderson.

Q. Who was there on the afternoon of the 21st when you went out there, Parker's employees to whom you made the speech or talked?

A. I didn't make—yes.

Q. Who else, when you got there?

A. Parker's men were there.

Q. Who else was there?

A. Parker.

Q. Parker and his men?

A. That's right.

Q. Workmen. Who else? Anybody else?

A. I don't believe ther ewas anybody else there.

Q. There was nobody else there the afternoon of the 21st?

Mr. McRee: I object to that.

A. Parker and his men were there at the—afternoon, at the time I got there. Later on, Mr. Henderson.

By Mr. Ward:

Q. When did Mr. Henderson get there?

[fol. 107] A. I don't know the exact time, but I would guess it to be around 3 o'clock.

Q. That's on the afternoon of the 21st?

A. That's right.

Q. Were the men working when Mr. Henderson got there?

A. They were.

Q. What did Mr. Henderson say or do?

A. He ordered the men off the job.

Q. Just like that?

A. Well, do you want me—do you want me to try to remember word for word what each thing happened? If I do, I may not be letter-perfect.

Q. On your premises on the afternoon of the 21st of August, Mr. Parker and the men working on the job were out there. You told the men that you were anxious to get the house done right?

A. That was—my conversation with them, as I've already testified, was after Mr. Henderson had been there.

Q. But you talked—did you talk to the men before Mr. Henderson got there?

A. I talked to them every day I was out there.

Q. On the afternoon of the 21st, sir, did you talk to the men before Mr. Henderson got there?

A. Oh, I may have spoken to them. They were pretty busy. Nearly always speak to people when I come in, but I didn't have any occasion to have any conversation; they were doing their work satisfactory, far as I knew.

Q. Then Mr. Henderson came out?

A. That's right.

Q. Did you talk to him?

A. Did I do what?

Q. Did you talk to Mr. Henderson?

A. Yes.

Q. What did you say to him or what did he say to you?

A. I didn't make a transcription of it, but I'll try to remember as near as I can.

Trial Examiner Fitzpatrick: Give us as well as you can, Mr. Stanley.

[fol. 108] The Witness: All right.

A. (Continuing) I was called over there by Mr. Parker, who—

By Mr. Ward:

Q. Called over where?

A. Called over to the area in which Mr. Henderson and Mr. Parker were standing in front of my house where the workmen were gathered.

Q. Yeah.

A. And Parker informed me that the job had been pulled and the men had been—that they—

Q. Please, I don't want to interrupt you; I realize you're trying to tell it—

A. Well, if you'll just ask me the question, I'll just answer it, instead of telling what he said.

Q. Talking about the job had been pulled, Parker had already ordered Watson's men off the job?

A. That's right.

Q. Is that the same day, the 21st?

A. Yes.

Q. Parker had ordered Watson's men off the job?

A. He told me he had, and they weren't on the job.

Q. But you weren't there? You don't know.

A. I don't know what?

Q. Now, we're coming down to the conversation you had with Mr. Parker and—when Mr. Henderson got there. Now, all I want to know is what he said to you and what you said to him on the afternoon of the 21st, Thursday.

A. I asked Mr. Henderson why the men couldn't go on and finish their work.

Q. I'm sorry; what's that?

A. I asked Mr. Henderson why the men couldn't go on and finish the work.

Q. I thought you had testified the men were working when you got there.

A. Mr. Henderson had ordered them to quit work when he got there. They were working when I got there. You're asking me what happened after I talked to—what I said to Mr. Henderson, didn't you?

Q. That's right.

[fol. 109] A. All right. I'm trying to tell you.

Q. All right; fine.

A. I said—I asked Mr. Henderson why the men couldn't continue on work. Mr. Parker—

Q. Who told you the men couldn't continue on working?

A. Mr. Parker.

Q. That his own employees couldn't continue working?

A. That's right.

Q. Why? Do you know why?

A. Because Mr. Henderson had ordered them off the job, was going to order them off the job, that they were working—that he wasn't going to allow them to work out there.

Q. Then you talked—then you talked to Mr. Henderson when he got there?

A. I did.

Q. What did you say to him and what did he say to you?

A. Well, the best I can recollect, I asked Mr. Henderson why we couldn't go on and finish the job now that Watson's men were not on the job any more and that there were no non-union men, far as I knew.

Q. Did you know these Watson's men were non-union?

A. I didn't know it; I didn't check up their credentials, but Mr. Parker told me they were non-union and it seems to be a general knowledge that they were non-union.

Q. Weren't you told by Parker when you bought the material from Watson's that they were non-union men?

A. I was.

Q. Then you must have known it on the 21st.

* * * * * *

A. (Continuing) Allright. Parker told me they were non-union.

By Mr. Ward:

Q. This is long before the 21st of August, isn't it?

A. First time I ever talked about.

Q. Weeks—how far before the 21st of August did you know that Watson's men were non-union, sir?

A. When we first started looking for material.

[fol. 110] Q. How long was that before August 21st?

A. I would say five or six days.

* * * * * *

Q. Now,—we are on the 21st again—now, you had a conversation with Mr. Henderson?

A. Yeah.

Q. What did you say to him and what did he say to you? We're going to take it very slowly and we'll go step by step, just like 'a' 'b' 'c' 'd'. Now,—

A. I asked Mr. Henderson, which I've already—

Q. You opened the conversation with Mr. Henderson?

A. After I was told that he was going to—the job had been pulled. That's the words Mr. Parker used.

Q. Yeah.

A. And that Watson—the men were no longer going to work, Henderson wasn't going to let them work with non-union men.

Q. Now, we're coming now to this little box here, conversation with Henderson.

A. That's right.

Q. What did you say to him and what did he say to you?

A. I asked him why the men could not continue to work, inasmuch as there were no non-union men on the job.

Q. Yeah.

Now, what did he say in answer to that?

A. He says that "We are not telling you that you cannot employ non-union men, but I am telling you that our men are not going to work alongside of them." I still went on to tell him that they were not there; why couldn't he finish the job or let the men finish it?

Q. Yeah.

A. He said "Because I believe that you will bring back the non-union men—"or the Watson's men, to be exact"—after we have finished, if I let them finish."

Q. Uh-huh.

A. I then said that I couldn't see how he expected to control my activities the rest of my life and how he expected to tell me what I was going to do or control what [fol. 111] I was going to do after the men finished, and he said, "Well, we just—you knew when you went to Watson's to buy your material that they were non—we were picketing the place", and—and he didn't use the exact words—I've forgotten exactly the words he used, but in so many words: "It's your responsibility now, because you went there and bought the material," and I—I really pleaded with him, because it was a case of needing a roof

over my head and being in a position where I—where it meant a lot to me, and as a last resort, I—just before he left, I said, "What can I do to get you to finish it, to let your men finish it?" and he said, "If you cancel your contract with Watson's." And I said, "If I cancel my contract with Watson's, it will cost me around a thousand dollars." And during the conversation, he asked me if—why I didn't get materials from a Union place and Union workmen; he said he could supply Union workmen. I explained all my troubles and all the details that Parker and I'd gone through with and all the places we'd been to and all the places I'd called (and I gathered from his—his attitude that he just didn't care and he wasn't interested in any of my conversation, that his mission out there was to take the men off the job and that any argument I gave him was useless, so I just said, "Good-bye."

Q. That was on August 21st?

A. That's right.

Q. Then Mr. Henderson left?

A. Yeah.

Q. What happened the next day?

A. The men didn't come to work.

Q. Huh?

A. The men didn't come to work.

Q. The men did not?

A. No.

Q. Did you get in touch with Parker?

A. Yeah.

Q. What did he have to say about it?

A. He promised to bring me some men out there to finish it.

[fol. 112] Q. Did he do that?

A. No.

Q. Who finished the job, the house?

A. Different people.

* * * * * * *

Q. Did Mr. Henderson mention the word 'contract', 'Watson's contract', to you?

A. Yeah.

Q. Just used that expression 'Watson's contract'?

A. He said, "If you'll cancel your contract with Watson's," the exact words he used.

Q. Did you ask him what he meant?
A. I knew what he meant.

. . . . . .

Q. But you asked Mr. Henderson what he thought you should do to get the work done?
A. I asked him what I could do.
Q. Was Mr. Henderson under contract with you?
A. I never met him before that day.
Q. Whom did you have a contract with?
A. Mr. Parker.
Q. Did you ask Mr. Parker what you could do to get the work done?
A. Yeah.
Q. What did he tell you?
A. He didn't seem to know, wanted me to talk to Mr. Henderson.
Q. Did he talk about cancelling contracts?
A. No.
Q. You had never met Mr. Henderson prior to the 21st of August.
A. I had not.
Q. That's the only solution he offered to you, was to—in your words—cancel the contract with Watson?
A. That's the final and only solution he gave me under condition in which he would allow his men to continue the job.

. . . . . .

[fol. 113] By Mr. Ward:

Q. That suggestion of Henderson was made on the 21st to cancel the contract with Watson?
A. Yes.
Q. Why didn't you do that?
A. I believe I've already testified that I told Mr. Henderson it would cost me in the neighborhood of a thousand dollars to do that. That's a pretty good reason, isn't it?
Q. They had been working—Watson's men, that is—from the 17th; they'd worked about four days on that job?
A. Four or five days, I'd say.

Q. But the only reason that you didn't adopt the suggestion made, if it was made, was because it would be expensive?

A. No, that's not the only reason. I usually like to live up to a contract or agreement.

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Re-direct examination.

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Q. Now, getting back to August the 21st, the day Mr. Henderson was out there, who was present when Mr. Parker told you that the job had been pulled?

A. Well, he came over and talked to me alone when he told me that. He then went over and said Henderson was —he knew, apparently, that Mr. Henderson was coming out, because he said "They're coming out to pull the job."

Q. Was that before Henderson got there?

A. Yeah.

Q. Well, now, what conversations—I mean,—I withdraw that question.

Did you hear Henderson say anything to the employees there on the job after he arrived in the afternoon?

A. Yeah, said "All of you pack up your tools, get off the job."

Q. Did he say why they were to get off the job?

[fol. 114] A. Said that they wouldn't allow them to work with non-union men.

* * * * * *

Re-cross examination.

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By Mr. Ward:

Q. But Parker had told you that he pulled the men on August 21st?

A. That he'd pulled the men?

Q. Uh-huh.

A. He told me that the job was pulled. Now, you can make your own interpretation of that. I'm not particular; I imagine he meant that they were through.

Q. Do you know what the word 'cancel a contract' means, don't you?

A. Yeah.

Q. When a man tells you that the job is pulled, what does that mean to you?

A. I think it meant that they weren't going to work any more.

* * * * * *

ROBERT S. FREEMAN, a witness called by and on behalf of the National Labor Relations Board, being first duly sworn was examined and testified as follows:

Trial Examiner Fitzpatrick: Take a seat and give us your name.

The Witness: Robert S. Freeman.

Direct examination.

By Mr. McRee:

Q. What is your address, Mr. Freeman?

A. 2101 McCallie Avenue.

Q. Mr. Freeman, were you employed by Mr. George D. Stanley in August of this year to supervise work on his residence?

A. Yes, sir.

Q. And about when did you start on that job?

A. Well, the work was started August the 4th.

Q. And what were your duties in connection—

[fol. 115] A. I was with Mr. Stanley a day or two before that, getting ready to start on the job, however.

Q. What were your duties in connection with that job, Mr. Freeman?

A. To keep the time and the cost of materials.

Q. And keep the time of which employees?

A. Mr. Parker's employees.

Q. Did you keep the time record on the employees of Watson's?

A. No, sir; not of Watson's.

Q. How about the employees who were doing such work as the plumbing and the electrical work and the plastering and painting, and so forth?

A. Yes, sir.

Q. And did you pay for materials that were needed on the job?

A. Yes, sir

Q. Do you recall about what date Parker's carpenters started working on this job?

A. On the morning of August the 4th, sir.

Q. And they worked on how long on that job?

A. Through to the evening of August the 21st.

Q. Do you remember when Watson's men started working on the job installing floor and wall covering?

A. Sunday, August the 17th, sir.

Q. Now, were Parker's men, the carpenters in his crew, working on that Sunday?

A. I don't remember, sir; Mr. Parker was there, I know.

Q. Did the Watson's men work—well, I'll ask you this question: Were you present on the job Monday, Tuesday and Wednesday following the Sunday that—of August the 17th, when Watson's men started working?

A. Yes, sir.

Q. Were Parker's men working on those days?

A. Yes, sir.

Q. And did Watson's men work on those days?

A. Yes, sir; I don't know whether they worked every day or not. There was a break of Watson's men was in [fol. 116] there. You'd have to refer to Watson's records, I imagine, to get the exact days.

Q. Did you ever see what conveyance Watson's was using to transport materials to this job?

A. Yes, sir.

Q. What was that conveyance?

A. It was a truck, sir.

Q. What type of truck?

A. A panel job with Watson's name on the side of the truck.

Q. And was that—about how frequently was that on the job?

A. The men were brought to the job in the truck, and at some times the truck was there to take the men home.

Q. Would they also bring material during the day?

A. They delivered materials in the truck also.

Q. Were employees of the carpentry crew working under Parker, were they present when this truck was on the job?

A. Yes, sir.

Q. Were you working there on August the 20th?

A. Yes, sir.

Q. Do you recall some discussion that Parker's men—about working with Watson's men?

A. Yes, sir.

Q. Just tell us, the best of your recollection, Mr. Freeman, what happened on that occasion, that you heard.

A. I believe I'd been in town for materials, and I returned and the men had stopped work and had gathered around the front door of the house. They were discussing whether they should continue working with Watson's men or not.

Q. Was Parker present at that time?

A. Yes, sir.

Q. And how long were they off the job on that occasion?

A. I would imagine 30 minutes, sir.

Q. And then what happened? How did the conversation terminate?

[fol. 117] A. It was decided that the carpenters would go back to work; for how long, I don't know.

Q. And they did go back to work?

A. Yes, sir.

Q. Did they finish the day, stop at the regular time that day?

A. Yes, sir.

Q. Now, you were present also the following day, August 21st?

A. Yes, sir.

Q. What time did you get to the job on that day?

A. What time? I didn't understand your question.

Q. What time did you get out to the residence on August 21st?

A. About 7:30, sir.

Q. Watson's men working, or did they come on the job while you were there on August 21st?

A. Yes, sir.

Q. Watson's men?

A. Yes, sir.

Q. What happened in—did they work that day, or what happened?

A. Late in the morning I noticed that Watson's men were'nt working. Mr. Parker told me that he had run Watson's men off of the job.

Q. Tell you why he run them off the job?
A. No, sir.
Q. Did they—did Watson's men come back on the job on the 21st after you had that conversation with Parker?
A. Not that I know of, sir.
Q. You didn't see them?
A. No, sir.
Q. Mr. Freeman, at that time, on August the 21st, was there a telephone there at the residence?
A. Yes, sir.
Q. Where was it located, sir?
A. In the breakfast room, sir.
Q. And did you—were you present when Parker had a telephone conversation there that day?
[fol. 118] A. I walked in, Mr. Parker was having a telephone conversation.
Q. Did you hear him call the names of the—refer to the person he was talking to on this conversation by name?
A. Yes, sir.
Q. What name was used?
A. Henderson, sir.
Q. And what—just what did you hear Mr. Parker say in this telephone conversation?
A. He told this person Henderson that he had run Watson's men off and asked if he had did the right thing.

Mr. King: We can't hear you over here.
Trial Examiner Fitzpatrick: Read the answer.

(Answer read.)

By Mr. McRee.

Q. Is that all you recall hearing him say?
A. Well, the conversation continued. I don't remember the rest of the conversation, sir.
Q. Were you present when Henderson came out to the job that day?
A. No, sir.

Mr. McRee: The witness is with you.
Mr. Ward: There's no questions.

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Dennis Pozzuto a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Fitzpatrick: Take a seat and give us your name.

The Witness: Dennis Pozzuto.

Trial Examiner Fitzpatrick: And the last name is spelled how?

The Witness: (Spelling) P-o-z-z-u-t-o.

Trial Examiner Fitzpatrick: Will you speak up so we can all hear. The accoustics in this room are not very good.

[fol. 119] Direct examination.

By Mr. McRee.

Q. Mr. Pozzuto, were you ever employed by the Watson's Specialty Store?

A. I was.

Q. And about when did you go to work for them, sir?

A. About February the 10th, this year.

Q. 1947?

A. That's right.

Q. And what was your job with that Company, Mr. Pozzuto?

A. Well, I had several different jobs. When I first started, I was out measuring and selling jobs and talking to prospective customers that came into the store. And after that, I was going out and doing the work, the installation of material.

Q. That's the installation of floor and wall coverings?

A. Yes, sir.

Q. Mr. Pozzuto, did you attend a meeting there when Mr. Henderson spoke to the employees about the Union?

A. I did not.

• • • • • •

By Mr. McRee:

Q. Were you working there, Mr. Pozzuto, when the picket first appeared in front of Watson's establishment?

A. I was.

Q. Do you know about what date that was?

A. If I would say a date, it would be a very wild guess.

Q. Or what month it was?

A. I believe it was in February or March.

Q. February or March of this year?

A. That's right; to the best of my knowledge.

Q. And has that picketing continued up into August of this year?

A. It has.

Q. Mr. Pozzuto, as part of your work with Watson Company, did you ever do any work at the residence of George D. Stanley?

A. I did.

Q. Do you know what day you started work out at Mr. Stanley's residence?

[fol. 120] A. We started work on Sunday; it was August the 17th.

Q. August the 17th. And who started work on the job on that Sunday; do you recall?

A. Did you say 'who'?

Q. Yes, sir; who, from the Watson Company?

A. There was Mr. Bullard was there, and Mr. Jack DeArmond, and I'm not certain if they were the only two besides myself or not; there may have been one other man, but I don't remember.

Q. And did you work on that job other days, other than this Sunday, August the 17th?

A. I did.

Q. Do you remember whether you worked on Monday, Tuesday and Wednesday immediately following the 17th?

A. I did.

Q. And who worked—I'll ask you this question: Were you working there on—on August 20th? That would be, I believe, Wednesday of that week.

A. I did, I worked then.

Q. How were your materials delivered on that job, Mr. Pozzuto; the material you were using for floor and wall covering?

A. The tools were usually taken on and off the job by the—the men doing the work, but the materials, the biggest part of the material was delivered at one time with the Company truck.

Q. Was that on Sunday, when you started the job?

A. No, I don't think it was. The only work we did on

Sunday was really preparation to begin the work itself. There was some old linoleum on the floor that had to be taken up before we could put the rubber floor covering on the kitchen floor. But the biggest majority of the material was brought out at one time and then as the necessity arose, the trucks delivered different material that we had run out of or had forgot to bring to the job.

Q. Could you give us the best of your recollection of how many times that truck was on the job on Monday, Tuesday and Wednesday of that week, starting on August the 18th?

[fol. 121] A. Approximately a half a dozen times.

Q. Were carpenters working in Parker's crew present when the truck was there on the job?

A. Not on Sunday, but they were on the following days.

Q. That is, Monday, Tuesday and Wednesday?

A. That's right.

Q. Now, was there any name on this truck?

A. Yes, sir.

Q. What name was that?

A. Well, there are two different trucks. One has Watson's Floor Covering Department—that's a Dodge panel truck—and the other is a—an International; it has Watson's Specialty Store.

Q. Both of them had the name Watson's on there?

A. Yes, sir.

Q. You—this is the only store in Chattanooga dealing in floor and wall covering by the name of Watson's isn't it?

A. As far as I know it is.

Q. Did you report for work on the morning of August the 21st?

A. The arrangement was made that, since I lived right next door to Mr. Stanley's residence, that instead of going into the store and then back out again, I just reported for work right from home, and I did go to Mr. Stanley's house on the 21st.

Q. And just tell us what happened, now, when you reported for work that morning.

A. Mr. Bullard and I had been doing most of the work prior to that day, and when I got there that morning Mr. Bullard had not reported for work. Mr. Parker met me in front of the house and told me that I wouldn't be able to

work that day. And I asked him why, and he said, "Because the—the other fellows would walk off the job if you do."

• • • • • •

By Mr. McRee:

Q. Just go ahead, now; what else was said?

A. He also said that—or rather, asked me if we wouldn't [fol. 122] come back and do the work at night, so the other men could work during the daytime. And I told him that I wouldn't; I didn't know if the rest of the men would, but I wouldn't see any reason why I should work at night so other men could work in the daytime. And he called Mr. Smith at the store.

Q. Telephone him, you mean?

A. Yes, and he had a conversation with him. I didn't pay too much attention to it. And then he told me that Mr. Smith wanted to speak to me. I spoke to Mr. Smith, and he told me to come on back to the store. So, I put my tools back in the car and went on in to the store.

Q. Did you ever go back out and do any other work on that job after that?

A. I have been out there, not right when we started going back, but several days after that.

Q. About how long after August 21st was it you went back there?

A. Oh, about five days.

Q. Now, on August the 21st, were the pickets still in front of Watson's Store?

A. Yes, sir.

Q. About how long did they continue picketing after that date?

A. About a week.

Q. About a week?

A. To the best of my knowledge.

Q. Do you remember the exact day they stopped?

A. Sir?

Q. Do you remember the exact day they stopped picketing?

A. No, sir; they were just there so long that it was just natural to see them and I didn't pay much attention to them anymore.

Q. Do you remember what signs the pickets were carrying there during that last week they were picketing?

A. During the last week?

Q. Yes, sir.

A. "This Store Does Not Employ Union Laborers." [fol. 123] I believe that was the sign. That had the "Local 74, Carpenters and Joiners"—

* * * * * * *

Trial Examiner Fitzpatrick: Did you finish the—your—the job that you were supposed to have done before that, or what?

The Witness: No, sir; up to August the 21st, there was several different things that had to be done. There were three bathrooms and one kitchen, and each of these rooms had to have wall covering and floor covering. Well, we started and went on and worked in the different rooms that would be most convenient so we'd be out of anyone else's way or they'd be out of our way. Therefore, there were some parts, some rooms that had been begun that had not been completed. So, the work was not complete—I mean, as far as the three bathrooms and kitchen.

Trial Examiner Fitzpatrick: Well, what I wanted you to clarify in the record was to what did you do, if anything, when you returned to the Stanley residence about five days after August 21; just come there for a visit, or did you work, or what?

The Witness: No, sir; I worked there.

Trial Examiner Fitzpatrick: All right.

Did you finish the particular job that you were on at the time?

The Witness: No, sir; I was not there when the job was completed.

Trial Examiner Fitzpatrick: Well, let's put it this way: How long did you work at the Watson—I mean, the Stanley residence when you returned five days, approximately, after August 21?

The Witness: All told, I'd say about a day and a half.

Trial Examiner Fitzpatrick: All right.

Mr. McRee: Let me ask this question to clear up the record:

By Mr. McRee:

Q. You were not the only employee working on the job after you went back?

A. No, sir.

[fol. 124] Q. And you didn't work there every day that other employees of the Company worked there?

A. No, sir. When we first started going back there, I was not assigned to that job again; I was put on another job and two other men went out there when they first went back, and about five days after, I finished my job a little early and on the way home I stopped at Mr. Stanley's house and helped the two men that were out there. And then I believe it was one day after that that I was assigned to work out there.

Q. The job was finished by Watson's men?

A. As far as I know, it was; yes, sir.

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A. D. Smith, recalled as a witness by and on behalf of the National Labor Relations Board, having been previously sworn, was examined and testified further as follows:

Further cross examination.

* * * * * *

Trial Examiner Fitzpatrick: Let me ask you this, Mr. Smith: I understand that the—the rough approximate total figure on this Stanley job was around $800.

The Witness: Yes.

Trial Examiner Fitzpatrick: Between $800 and $900.

And is it possible for you to give us an approximation at this time as to the percentage paid for material, or approximate percentage paid for labor?

The Witness: On an average job, I can't. This job was —was a very expensive job for us. There was very little profit in it, due to the fact that we were up—held up and our men lost so much time running back and forth; due to the trouble, labor was a big matter.

Trial Examiner Fitzpatrick: I'm not talking about the profit; I'm asking if you can't give us sort of a rough approximation as to the amount—

The Witness: Of labor?

Trial Examiner Fitzpatrick: Figured in the labor on [fol. 125] that job, and the amount you've figured in for materials. Those are the only two things that were figured; isn't that correct?

The Witness: In other words, my cost of material and my cost of labor are the only figures. I don't know, and I don't have them here.

Trial Examiner Fitzpatrick: You can't give us an approximation?

The Witness: I couldn't on this particular job; no, sir.

Trial Examiner Fitzpatrick: All right.

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Mr. McRee: (Continuing)—4 (A).

It's true, Mr. Examiner, that the strike order is- issued by Henderson pulling the men off these jobs—this job of Stanley's took place on August 21st. We're not alleging—it's not alleged in our Complaint that the mere issuance of that order on that date violated the Act, because, of course, the Act did not become effective until midnight on the 22nd. We do say, though, that by failing to rescind that order, by continuing that order in effect on August the 23rd, or after midnight on the 22nd, that Henderson did violate the National Labor Relations Act. This is a continuing strike. True, they pulled them off the day before the Act goes into effect, but they admit in the Answer that they have thereafter continuously taken this position, that these employees could not go back to work on that job. * * *

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Jack B. Henderson, a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Trial Examiner Fitzpatrick: Have a seat.

Give us your name.

The Witness: Jack B. Henderson.

Trial Examiner Fitzpatrick: Jack B.?

The Witness: I said Jack B. Henderson.

[fol. 126] Direct examination.

By Mr. King:

Q. Where do you live, Mr. Henderson?

A. 2713 East 13th Street, Chattanooga.

Q. And what is your occupation?

A. I'm Business Agent for the Local 74 Carpenters.

Q. How long have you been holding that position?

A. Since April 1943.

Q. What—what Union is your Local Union affiliated with?

A. With the—

Q. United Brotherhood of Carpenters and Joiners of America?

A. Yes, sir.

Q. Headquarters, where?

A. Indianapolis, Indiana.

Q. Were you Business Agent for this organization—were you Business Agent for Local No. 74 at all times since January 1st, 1947?

A. Yes, sir.

Q. And are you still in that position?

A. Yes, sir.

Q. Now, what is Local No. 74? Is that a local organization, a Local Union made up of local members, and if so, what territory does it cover?

A. It's a Local Union made up of members; that covers territory between this and other cities that have—halfway between this and other cities that have a Local Union.

Q. I'll ask you to state now whether you have—that is, your Local Union has had cause to picket the premises of Watson and Company here in Chattanooga up to January the 30th—I mean, August the 30th, of '47.

A. Yes, sir.

• • • • • •

Q. Do you have Local Unions here who cover that industry, the same industry that is covered by Watson and Company?

A. Ours do; yes, sir.

Q. And you have men who are members of your Union who are doing the same work that Watson's doing?

[fol. 127] A. Yes, sir.

Q. Do you have dealers here who have—who employ Union men who sell the same or similar products as Watson and Company?

A. We do.

. . . . . .

By Mr. King:

Q. Since, oh, August 21, 1947, have you or your organization done anything whatsoever other than withdrawing from the job, Stanley's job; that is, have you done anything else whatsoever against Watson's or to injure Watson's?

Mr. McRee: Same objection, Mr. Examiner.

Trial Examiner Fitzpatrick: You can answer.

A. No, sir; except we've been running an ad in the Labor World.

. . . . . .

By Mr. King:

Q. Now, Mr. Henderson, as Business Agent for this Local Union did you have occasion to call at the Stanley job on or about August the 21st, 1947?

A. Yes, sir.

Q. Did you ever call on that job at any other date?

A. No, sir.

Q. Was it on August 21, 1947?

A. Yes, sir.

Q. What time was it?

A. Well, it was in the afternoon. I don't remember the time.

Q. And what was your purpose in going to the job?

A. To make an investigation.

Q. And what was the investigation about?

A. Well, I'd received a telephone call that our members were working with non-union and I—and that's why I went out there.

Q. And now, when you got out there, what did you find?

A. Well, I found that they were.

Q. And what did you do?

A. I advised the—our members that we were not—could [fol. 128] not work with non-union men and—or where non-union men are employed.

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By Mr. King:

Q. Now, did you take anybody out there with you?

A. Yes, I took Mr.—got Mr. Rose to go with me.

Q. And what is his occupation?

A. He's a carpenter and he's a member of our organization and officer of our organization.

Q. Now what took place then? Go ahead and state whether or not your men remained on the job or left the job.

A. Well, when I left, they had not left the job, simply because you can't just quit a job all at once; I mean, you—you've got to—several things to do before you can leave a job, and I didn't stay there very long.

Q. Now, while you were there, did you have any conversation with Mr. Stanley?

A. Yes, sir; I was introduced to Mr. Stanley by Mr. Parker and talked with him a few minutes, at which time I told him that we could not work with non-union men and the conversation was very friendly; he told me had a brother that was a member of a union; he was in sympathy with the Union.

Q. Now, what, if anything, else did you say to Stanley or Stanley say to you?

A. Well, I said just as little to him as I—that I could under the circumstances. He said things to me that—about the job, that he was wanting to get his house finished.

Trial Examiner Fitzpatrick: Tell us, as well as you can, in your own words, just what the conversation was.

The Witness: Well, I told him to begin with that we was withdrawing from the job because we could not work with non-union men. He mentioned to me that he had let the work to Watson and Company; he also mentioned that he's went to different places to look for material and he also told me that he had a contract with Watson and Company, to which I replied that I was not interested in any [fol. 129] contract that he had with anyone, that we were

leaving the job simply because we would not work with non-union men. I did not ask him to breach a contract with Watson. I did not intimate that I wanted him to, and that was my purpose in asking Mr. Rose to accompany me there, so that I would have a witness to that—

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Q. Did you state to anybody that you had in mind the purpose of boycotting Watson's goods or their jobs?

A. No, sir.

Q. Did you have that purpose in mind when you took your men off the job?

A. No, sir; we taken them off because we will not work with non-union men.

Q. Now, I'll ask you to state whether that is a self-made rule or that is a rule of your Union.

A. That is a policy of our organization.

Q. I'll ask you if that policy is set out in your working rules of your Local No. 74.

A. Yes, sir.

* * * * * *

By Mr. King:

Q. I'll ask you to state whether or not that which has been marked as Respondent's Exhibit No. 2 constitutes the trade rules of this Local.

A. Yes, sir.

Q. And now state whether or not you have an International Constitution by which your Local is governed.

A. We do have; yes, sir.

Q. State whether or not the trade rules which I have just put in evidence are made pursuant to the provisions of the International Constitution.

A. No, sir; they're made—pursuant to the Constitution; yes, sir.

Q. Your answer 'yes'?

A. Yes.

* * * * * *

[fol. 130] Cross examination.

By Mr. McRee:

Q. Mr. Henderson, what is the territory, the geographical territory, of the Local?

A. Well, it extends halfway between this and other cities that have Local Unions. For example, halfway between here and Nashville, halfway between here and Knoxville, and so forth.

Q. Well, now, that's two directions; you also go south and east of here?

A. Yes, sir.

Q. Your Local, then, goes down into Georgia?

A. Yes, sir.

Q. How far into Georgia do you go down?

A. Well, that depends on how far in Georgia the next Local Union is in that direction.

Q. Where is the closest Local in Georgia to you?

A. Well, in one direction it's Dalton, Georgia.

Q. You go half way between here and Dalton?

A. Yes, sir.

Q. That takes you approximately how far over the Georgia Line on that Dalton Road? Just approximately—I don't mean exactly.

A. Well, I don't know how far it is from here out to the Georgia Line, but it's about 15 miles from the City. Dalton's about 30 miles, and that takes us to Ringgold, now.

Q. You take in the City of Ringgold, Georgia?

A. That is right on the dividing point.

Q. You mean—is that in your jurisdiction or Dalton's jurisdiction?

A. Yes. Well, to be technical, I guess half of it would be in our—the north part of the city.

Q. Half in the other.

And moving over now a little the other way, is there a Local in Rome?

A. Yes, sir.

Q. Do you go halfway from here to Rome, too, Rome, Georgia?

A. Yes, sir.

* * * * * * *

[fol. 131] By Mr. McRee:

Q. Just tell us any other towns besides Ringgold your Local has jurisdiction in Georgia.

A. Well, La Fayette is in our jurisdiction, La Fayette, Georgia; down to Trion and—well, that's all I can think of—and Rossville; that's in our jurisdiction. You said towns, did you not?

Q. Yes, sir.

A. That's all I can think of in Georgia at the moment.

Q. How about in Alabama? Do you also have some there?

A. Yes, sir; we go in that direction halfway between here and Gadsden.

Q. Halfway between—that takes you about how far over into Alabama, just roughly?

A. Oh, about Fort Payne.

Q. That's about 40 miles?

A. Yes, sir.

Q. In Alabama?

A. Yes, sir.

Q. And you take in a number of towns in between here and Fort Payne

A. Yes, sir.

Q. You also—you don't get over into North Carolina with this Local, or do you?

A. No, sir. No. We have no jurisdiction in North Carolina.

Q. And that was the same jurisdiction that the Local's had all—all along while you've been Business Agent?

A. Well, practically so. It's subject to change if another Local Union is put in somewhere.

Q. Yes, sir; well, confined to this year, they've had this same jurisdiction all of 1947?

A. Yes, sir.

Q. Now, do you remember about what date this picketing of Watson's started, Mr. Henderson?

A. As I remember, it was about April the 1st.

Q. And you established that picket out there after you'd presented them with a closed-shop contract?

[fol. 132] A. Yes, sir; but not because they didn't sign the contract.

* * * * * *

By Mr. McRee:

Q. What was your first association with Watson and Company and the Store or its employees?

A. Did you say what or when?

Q. Well, when first, and then we'll get to what.

A. Well, it was in the early part of February.

Q. And now, what?

A. Well, I was called and told that Watson had deliberately sent their non-union men in to work with our Union men in a store, and was asked to come to the job and—

Q. What store was that?

A. That's the store which they now occupy.

Q. Their property.

A. Yes, sir.

Q. I see.

All right.

A. I went down there and I first talked with one of the employees of Watson's, Mr. Templeton, who had been involved in the argument between himself and our members. I later, after talking to him, went and talked with Mr. Smith.

Q. Well, just briefly—now, I don't mean go into detail, but just briefly, what was the substance of that conversation?

A. Well, I talked to him about the Union and his member—his employees belonging or him hiring Union men to execute his work.

Q. You were trying to get him, then, to hire Union men to do this installation work?

A. Yes, sir. At that time.

Q. What did he tell you?

A. Well, we had a meeting with the men the next day, I think it was.

Q. Where was that meeting?

A. In their store.

Q. You asked to have that meeting, didn't you?

[fol. 133] A. Yes, sir.

Q. And they arranged it for you?

(Witness nods head affirmatively.)

Q. The answer is 'yes'?

A. Well, they told me the men would be there after 5:00; I guess that was, in a sense, the arrangements for the meeting.

Q. The meeting was in Watson's Store?

A. Yes, sir.

Q. And Mr. Smith there?

A. Yes, sir; he was.

Q. Did you ask him to be present?

A. He was in the store and I asked him to come on down to where we was having the meeting, and he did.

Q. I don't mean to go into any great detail now, but just what was the substance of the meeting?

A. Well, I tried to point out to these men the advantages of them belonging to the Union, also the advantages of their Company for them belonging to it.

* * * * * *

By Mr. McRee:

Q. Just go ahead and tell us, in substance, what happened at the meeting.

A. Well, the men, after talking to me, taken it under advisement, I presume, or either got instructions from Mr. Smith what to do.

* * * * * *

By Mr. McRee.

Q. You later heard that the employees didn't want to join the Union; is that right?

A. Yes, sir; I—if I remember correctly, Mr. Smith told me they had decided not to join.

Q. Did you have any other meetings with Mr. Smith after that?

A. Yes, sir; a few days later I met him again and discussed it further with him.

Q. Did you present him—when did you present him with this contract?

A. Well, I don't remember the date, but it was early in February of—two or three days after my first comment, a few days later.

[fol. 134] Q. That was after you'd had the meeting with the employees?

A. Yes, sir.

Q. Did you ever have any other meetings with the employees other than that one in Smith's—in Watson's Store?

A. I don't think I did; I don't remember.

Q. I don't mean to go into great detail, but this contract—

A. Might have had one of them or something.

Q. This contract was a closed-shop contract, wasn't it, providing they only employ members of your Union?

A. It was a short form of contract that we had used with other employers. I presented it to Mr. Smith, who told me he would present it to his legal department.

Q. Do you have a copy of that contract?

A. I haven't with me; no, sir.

Q. Well, it did provide only members of your Union would be employed?

A. Only members; yes, sir.

Q. Which is commonly called a closed-shop contract?

A. Yes, sir.

Q. And then did you later have some meetings here with Mr. Griffis, the lawyer for the Company?

A. Yes, sir; I had two meetings with Mr. Griffis.

Q. What did you—

A. At his invitation.

Q. Now, just what was the substance of your meetings with Mr. Griffis?

A. Well, the first one, he called me at home very late one night when I wanted to be asleep, told me he had been assigned to the case and asked me to come down to see him for the purpose of working out the controversy, and I went down there and found out that was not his purpose at all.

Q. Just tell us what happened, Mr.—

A. Well, he just put up an argument to me, that's all.

Q. Put up an argument; you mean, he wouldn't sign the contract?

A. I didn't ask him to.

[fol. 135] Didn't ask him to?

A. No, sir.

Q. What were you arguing about?

A. Well, at that time the closed-shop law had been—anti-closed shop law had been passed.

Q. Oh, I see.

A. And I presented him a copy of the Act and told him that we were not asking Watson's to violate the law, and—

* * * * * *

Q. Now, you say, as I understand your testimony now, that—that you found out either from Parker or Watson—Stanley or somebody out there that afternoon that Parker had sent Watson's men home?

A. I found it out on or about that time; I just don't remember the time where I—or from whom I received that information.

Q. Wouldn't that have changed your—or would that have changed your rule that your members couldn't work out there with non-union men if they'd already been sent off the job, no longer working?

A. Beg your pardon?

Mr. McRee: Read the answer—question.

Trial Examiner Fitzpatrick: Read it.

(Question read.)

A. Not one bit.

By Mr. McRee:

Q. Will you explain that for us, now?

A. I don't know what it is you want explained, Mr.—.

Q. Well, if- I thought you'd testified that your rule was that they couldn't work with non-union men. If the non-union men had already been sent off the job, were not working, why couldn't your men keep on working?

A. I also testified that we would not work where non-union men were employed and they are—to us, were still employed on that job.

Q. Oh, I see; even though they didn't come back on the job?

[fol. 136] A. That would have been an appeasement.

Q. Been appeasement?

A. Yes, sir.

Q. Even if they'd waited till your men completely finished their work to come back; is that your testimony?

A. Absolutely. Why should we help an employer use non-union men?

Q. Even if he wasn't going to use them when your men were there at all?

A. Absolutely.

Q. If I understand your testimony, then, as far as the rule of your Union's concerned, as you understood it, you

wouldn't have allowed your men to work on this job if he was going to use Watson's men to lay that floor covering, even though they never had to work alongside of each other; is that right?

A. Well, that is right, but I would like to ask you—or ask him, maybe, to have him stop referring to the members of the Union as 'my men'; they're not my men.

Trial Examiner Fitzpatrick: Well, we—give due note to that comment of yours.

The Witness: They're members, and I take my instructions from them; they don't take instructions from me. I take instructions from them.

By Mr. McRee:

Q. You advise them, is that it?

A. I advise with them, I guess would be the best.

Q. Yes, sir; all right. You advise with them.

If I understand your position, you advised with the men they'd have to cease work out at the Stanley place on the 21st because Stanley had had these non-union men from Watson's out there working; is that correct?

A. Yes, sir.

Q. And as you understand the rules of your organization, as you understood them, your men couldn't go back out there and work on that job and finish it because Watson's had already done part of the job?

* * * * * *

Q. * * * Well, maybe I misunderstand you now. If I get your testimony—maybe I did misunderstand you. Wat- [fol. 137] son's had already done a certain amount on this job, they'd already worked there when you got out there; they had completed a certain amount of work, hadn't they?

A. Beg your pardon? Had completed?

Q. A part—

A. I don't know; I don't know whether there was any of it completed or not.

Q. Well, maybe I misled you by the word 'completed'; I mean, they started it?

A. Yes, sir.

Q. And had done a certain amount of work?

A. Yes, sir; there had been some work.

Q. Well, now, after you discovered that condition, that they'd already done work in the shop, under your interpretation and your knowledge of the Union rules which you were advising the men about, would there be any way for your men to have done any more work on that job at all?

A. No, sir.

Q. Whether he cancelled his contract or what he was—as far as you were concerned, that job was—

A. May I explain?

Q. (Continuing)—beyond the pale?

A. Uh,—

Q. Yes, sir; I wish you would explain.

A. I was out there in the interest of Local 74, not in the interest of Watson's or Stanley. I was out there in our interest.

Q. That's right; and according to your interests and your interpretation of the rules, once you found that Watson's had contaminated that job by letting a—non-union men come out, that then they—regardless of what they did, there was no way to undo that wrong from then on; that job could not be manned by members of your Union?

A. I wouldn't say that.

Q. Well, what could they have done?

A. I said before that if we ever furnished any men for [fol. 138] that job it would have to be done through some special concession or dispensation.

Q. Have to have a special dispensation from the powers that be; is that it?

A. From the Local Union.

Q. From the Local Union.

Under your interpretation, that job was taboo, it was beyond the pale on August the 21st?

A. Well,—

Q. All right.

A. You make it pretty strong, but I—

Q. That's right.

• • • • • •

Re-direct examination.

By Mr. King:

Q. You were asked something about Watson's products. Have you ever refused or is it a policy of your organization to refuse to work on material or products of any manufacturer or dealer?

A. No, sir.

Q. And would you, if you had an opportunity to work on Watson's linoleum, laying it, or any of their other products, would you have done so?

A. Yes, sir.

Trial Examiner Fitzpatrick: What was that answer?

The Witness: Yes, sir.

Mr. Ward: He said "Yes, sir".

The Witness: Yes, we have, on the material.

By Mr. King:

Q. Did you at any time ever state to Mr. Stanley that you would not work on any material furnished by Watson?

A. No, sir.

* * * * * *

Re-cross examination.

* * * * * *

Mr. McRee: Mr. Examiner, I think some reference has been made to ads that this Union ran in regard to this business. I want to ask the witness a question or two about that.

[fol. 139] By Mr. McRee:

Q. I believe you testified that you have had ads in the—some sort of paper in regard to—to Watson's?

A. Yes, sir; we did have.

Q. What papers have you been carrying those ads?

A. Labor World.

Q. Labor World?

A. Yes, sir.

Q. That's a weekly paper published by the Central Labor Union here in Chattanooga?

A. Yes, sir.

Mr. McRee: Mr. Reporter, would you mark as Board's Exhibit 6 for identification what purports to be a page—Page 5 of the September 24th, 1947 issue of the Labor World.

(Thereupon the document above referred to was marked Board's Exhibit No. 6 for identification.)

By Mr. McRee:

Q. I show you this document which has been marked Board's Exhibit 6 for identification (handing document to witness). I'll ask you if that's one of the ads that—that your organization had published in this paper.

A. Yes, sir.

Q. And the reference to Watson's is down here at the bottom of the ad: "The Ira A. Watson Company refuses to employ our members to do this work although we are qualified and have been recognized as the proper craftsmen for this type of work. Do not be deceived by Watson's claim that this work is not part of our craft." Is that—did you have a similar reference in numerous other ads that appeared before this date?

A. Yes, sir; we run that same ad for several weeks. I don't recall just how long.

Q. Was that—do you know about when they started?

A. No, sir; I don't remember right now.

Q. Are the ads still being carried?

A. No, sir.

Q. Do you know about when they were discontinued?

[fol. 140] A. This week.

Q. This week?

(Witness nods head affirmatively.)

* * * * * * *

T. S. Rose, a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Trial Examiner Fitzpatrick: Take a seat.

What is your name, please?

The Witness: T. S. Rose.

Direct examination.

* * * * * *

Q. What is your occupation, Mr. Rose?

A. Carpenter.

Q. Are you a member of the Carpenters Union, Local No. 74, of the A. F. of L.?

A. Yes, sir; I am.

Q. Who are the Respondents herein?

A. Yes, sir.

Q. What official position, if any, do you hold with that Local Union?

A. Recording Secretary.

Q. How long have you held that position?

A. Oh, a year and a half, something like that.

Q. Mr. Rose, have you ever met Mr. Stanley, who was one of the witnesses in this case?

A. Yes, sir.

Q. And state where you first met him.

A. I met Mr. Stanley down here on the Birmingham Highway, I presume at his home.

Q. Is that the place where he was having his house repaired?

A. That's right.

Q. Do you recall the date?

A. On or about August the 21st.

Q. Was that the only time you've ever been there?

A. Yes, sir.

[fol. 141] Q. And if—strike that, please.

And what was your purpose, or how did you happen to go out there?

A. I was at my home and Mr. Henderson, Business Agent of the Carpenters, called me on the telephone and asked me if I would accompany him on a trip down on the Birmingham Highway on the job that was being did by Mr. Parker, B. F. Parker. I told him I would and he came to the house. We went down there.

Q. Did you at that time meet Mr. Stanley personally?

A. I don't believe I was introduced to Mr. Stanley.

Q. Were you present at any time during that visit, during conversation between Mr. Stanley and Mr. Henderson?

A. I was.

Q. Can you state whether there was more than one such conversation?

A. No, more of a continuous conversation.

Q. Just state, then what you heard Mr. Stanley say, if anything, to Mr. Henderson, and what you heard Mr. Henderson say, if anything, to Mr. Stanley on that occasion.

A. Mr. Parker introduced Mr. Stanley to Mr. Henderson and they told—Mr. Parker told Mr. Stanley that—that the job was being pulled, the men were being taken off the job or something like that, and one—Mr. Stanley asked the question why it was being done. Mr. Henderson told him that we—our men could not work with non-union men.

* * * * * *

Q. Was there anything said about the Union's refusal or Mr. Henderson's refusal to allow our men to work on material furnished by Watson's?

A. No, sir.

* * * * * *

Cross examination.

* * * * * *

Q. And let's just go over again, now, Mr. Rose, just what happened when you got out there. Who was the first person [fol. 142] that you or Mr. Henderson talked to, now, when you arrived at the Stanley residence?

A. Mr. Parker and a Mr.—

Q. Anyone else present, now, when you first talked to Mr. Parker?

A. Yes, sir; Mr. Stewart, Dan Stewart, and Mr. Larkin.

* * * * * *

Q. Now, did you hear what Parker said to Stanley when he went over and talked to Stanley?

A. Yes, I heard that—they was very close to us.

Q. What did they—what conversation did they have, sir?

A. He told Mr. Stanley that the—that the carpenters were going to leave the job on account of the non-union men working there.

* * * * * *

Q. And then what did Stanley say, if anything?

A. He came over and asked Mr. Henderson why, then, that they were taking the men off the job.

Q. And what did Henderson reply?

A. Mr. Henderson replied that our men could not work with non-union men, especially where they were doing the work that were—come under our trade.

* * * * * *

BENJAMIN FRANKLIN PARKER, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner Fitzpatrick: Take a seat and give us your name, please.

The Witness: B. F. Parker.

Trial Examiner Fitzpatrick: Is that the way your name appears heretofore in the record?

The Witness: Yes, sir.

Trial Examiner Fitzpatrick: What the "B." stand for?

The Witness: Benjamin Franklin Parker.

Trial Examiner Fitzpatrick: Benjamin F. Parker.

[fol. 143] The Witness: Residence, 1600 Bailey Avenue, Chattanooga, Tennessee.

Trial Examiner Fitzpatrick: Proceed.

Direct examination.

* * * * * *

By Mr. King:

Q. Well, state what was your understanding with reference to the hiring and discharge of those employees on the Stanley job.

A. I was to do all hiring and firing and buying of all materials.

Q. And was there anybody besides you that had any supervisory capacity on those jobs?

A. Mr. Freeman paid—took care of the payroll, Mr. R. Freeman.

Q. I said supervisory, not in the duty of paying.

A. No, none whatsoever.

Q. If anything was not satisfactory to the owner, Mr. Stanley, who would he go to, you or the men?

A. He came to me.

Q. Did he have any right to hire any men under your agreement, or—

A. He did not.

Q. Did he ever hire any, regardless of the contract?

A. He made a contract, yes.

Q. He made what?

A. He made the contract, yes.

Q. I say, did he hire out—

A. Oh, no; he didn't hire any men.

Q. Now, where did you hire your men from or through?

A. I hired my men, all my men, through all of the Local Unions in the City of Chattanooga.

Q. Did you employ other men than carpenters? I mean, did you hire different crafts besides carpenters?

A. Oh, yes.

Q. Well, just describe the different crafts, please.

A. Well, I—

Q. Electricians?

A. This is the background, I just want to say this much: That I hired the electricians and—I mean, I supervised [fol. 144] the electrician's work; I supervised it with sub-contracts under the same conditions that my contract was with Mr. Stanley. And I supervised the electricians, I supervised the plumbers, and I supervised the plasterers; in fact, I supervised the whole job.

Q. But when it come to the employing of help, did you do all of the employing, initial hiring?

A. I did.

Q. And the firing?

A. That's right.

Q. And when a man was to be paid, what was the method of procedure in getting a man's pay?

A. I turned in the time to Mr. R. S. Freeman and he, in turn, gave him a check for their time.

Q. Now, what—what was the method used in paying for material which you ordered?

A. We went to town and bought it and paid cash for it most of the time.

Trial Examiner Fitzpatrick: Who do you mean by 'we'?

The Witness: Mr. Stanley and Mr. Freeman and me.

By Mr. King:

Q. Now, these men that you employed, did you have any contract with them or with anybody, or were they free to come and go from your job to any other job if they wished to do so?

A. My men at all times are free to quit at any minute or any hour during the day and go to any other job they want to go on; that's their privilege.

. . . . . .

A. (Continuing) She couldn't find the colors of material that she wanted there. We left Fowler Brothers and Mr. Stanley suggested that we go to Watson's Specialty Store on Broad Street and see if we could find any material over there. I accompanied Mr. and Mrs. Stanley to Watson's, walked over a picket line into Watson's Store. We walked into Mr. Moore. He interviewed Mr. and Mrs. Stanley in regard to the purchase of material and at the time when I—he begin to talking about buying the material from Watson's, I told him, I said, "Mr. Stanley," I said, "Watson's [fol. 145] works non-union men," and I said, "My men cannot and will not work, according to trade rules of the Union, will not work with non-union men and there's no—I don't see any necessary—necessity of us sticking our neck out and having the job pulled; if you're so urgent to get into your residence, let's look somewhere else for the material." And Mr. Moore of Watson's at the time told me, he says, "Well, Mr. Parker," says, "All in the world that we want is a chance that the Carpenters Local," he said, "We have an injunction against them," and says, "We're dying to get to sue them and get this case over with," says, "I'll assure you we won't have no trouble on the—on the job." And I told Mr. Moore—there was quite a controversy over it—I told Mr. Moore, "Mr. Moore, I'm sorry, but I work Union men and they'll walk off the job and I don't see any necessity of Mr. Stanley jeopardizing the job of hiring non-union men and causing the men to stop work on the job." And Mr. Stanley said, "To hell with the Union"; he says, "I'll do as I please." And Mr. Moore assured Mr. Stanley that if the Carpenters Local No. 74 or any Union offered any trouble on the job that all they had to do was go up to the Chancery Court and—enforce this injunction

and sue them for $60,000 or whatever amount they wanted to and get damages. I, in turn, told Mr. Stanley it was his money and it was his home, and if he bought the material he was sticking his neck out and that I wouldn't be responsible for the job thereafter and I walked out of the store and that's all there was to the case. Went on back to the job, kept on working on the house.

Q. Was this—up to now, where were you, in the store of Watson's?

A. I was in the store at Watson's, but I walked out of the store at Watson's when Mr. Stanley told me that—"To hell with the Union," and that I could do—that he'd do as he pleased with his money.

Q. You'd already advised him—

A. I'd already advised him what to expect.

Q. What was that?

[fol. 146] A. That the men would not work with non-union men; I've had trouble with them before.

Q. Now, you say Mr.—Mr. Stanley was there, Mr. Moore was there?

A. And Mrs. Stanley.

Q. And Mrs. Stanley. And you had already had a contract that you would furnish the labor?

A. I was to do the job complete and he took it out of my hands when he went to Watson's and gave it to them.

* * * * * *

By Mr. King:

Q. Now, in the employment of non-union men, can you explain that; is that a part of the Watson contract with Stanley, that he woud furnish the men? Is that what you mean?

A. Well, Stanley didn't give the contract that day that I was with him in Watson's; he waited two or three days before he gave the contract, before they made up their mind on the colors of the materials—his wife, I think. But two or three days later, or a short time, George came in and told me that he had gave Watson's the contract to—he bought the material there and they were going to apply it for a certain amount of money, and I told George, Mr. Stanley at the time, I said, "George," I say, "You've stuck your neck out." I said, "These men absolutely will

not work with non-union men and I've told you," and I says, "I'm not responsible for the job when the men come on the job."

• • • • • •

By Mr. King:

Q. Mr. Parker, if Mr. Stanley could have purchased from Watson's and Watson's would have sold him the material which you were to use on that house, would you have gone ahead with the Union men and done the work?

A. Yes, sir; I have done it in other cases.

Q. Now, I'll ask you this: Was the objection to Watson's over the working of non-union men or was it the objection over the material? Now, were you—were your men objecting to the working of non-union men?

A. Well, our—the Union won't work with non-union men. [fol. 147] Q. Well, that's the question and that was the objection; is that correct?

A. That's right.

• • • • • •

Cross examination.

By Mr. McRee:

Q. As I understand your testimony, Mr. Parker, you sub-contracted for a number of these operations on the Stanley job?

A. I did.

Q. That was electrical work and—

A. And I supervised them.

Q. You supervised them?

A. I did.

Q. Of course, you were going to supervise this linoleum laying the same way?

A. Well, what other case as it for me to do after he did what he did?

Q. I'm just asking you, sir; you went to these other stores?

A. I didn't have anything to do with the contract with Watson's; I didn't make the contract, I had nothing whatsoever to do with it. Mr. Stanley made the contract direct and I didn't have a thing in the world to do with it.

Q. You went ahead and worked after these men came on the job to install the linoleum, asphalt—

A. Went ahead and worked?

Q. Yes, sir.

A. Sure.

Q. And they worked out there—they started on Sunday, I believe, didn't they?

O. We did that on account of the condition of Mr. Stanley's wife.

Q. I'm not asking what you did; I'm asking you when you did it, Mr. Parker. Just answer my question.

A. They started on Sunday, yes.

Q. And that was the 17th of August?

A. That's right.

Q. And you were there that day?

A. I was there every day.

[fol. 148] Q. You knew they were Watson's men?

A. I knew that he'd made the contract with him, yes.

Q. And did you have a conversation with Mr. Stanley the next day, Monday, about Watson's men on the job?

A. I told Mr. Stanley that he'd stuck his neck out and whatever he wanted to do about it, why, that was his baby from there on out.

Q. Let's back up a little now. Didn't you, in this conversation, when you were down there in the store, wasn't there some talk about Watson's men working on Sundays or at nights or other days when your men were not working?

A. I told George Stanley that—and Mr. Moore both, at the time, I said, "If he's compelled to give Watson's the contract," I said, "The men on the job," I said, "I'm not responsible for it." I said, "You can do it Sundays, nights or any other time." I said, "It's immaterial to me." I said, "I've advised you of what would happen on the job; now you've gone contrary to our contract and it's your baby"; that's exactly—

Q. What was contrary to the contract?

A. I asked him not to buy it down there on account of my men being non-union—I mean, Union men, that they would not work with him; that was the controversy all the way through.

Q. Oh, just the fact that these were non-union men and your men—your men were Union men?

A. That's right; I told Mr. Stanley that we'd have trouble.

Q. It would have been perfectly all right for him to have sub-contracted this floor and wall covering any other store that employed Union men?

A. Employed Union men; it would have been all right. We wouldn't never had any trouble.

Q. You wasn't insisting, then, that your carpenters, then, in your crew do this linoleum work; you were just insisting that he contract for this linoleum work with some firm that employed Union men?

A. That's it, exactly.

Q. O. K.

[fol. 149] Now, what did you say that you told them about working at night or Sundays or any other day?

A. I told Mr. Stanley, I said, "If you've got to give Watson's the contract for the linoleum and everything else," I said, "That leaves me out of it absolutely." I said, "They can do it at night or—" I said, "Or do it whenever they want to do it." I said, "You can sub—you can—whatever the men do down there," I said, "I'm not responsible." I said, "They absolutely will not work with Watson's men."

Q. Did you suggest that they work at night or at times—

A. The—

Q. Just a minute; let me finish the question. (Continuing)—work at night or Sundays or times when your men were not working on the job?

A. I even went far enough to call Mr. Smith to—to make the arrangements for him to finish the job on account of the condition of Mr. Stanley's wife. I certainly did.

Trial Examiner Fitzpatrick: "I certainly did"; is that your answer to the question?

The Witness: That's right.

By Mr. McRee.

Q. You called Mr. Smith and—that was after the—when was that you called him?

A. After Watson's men were on the—on the job down there.

Q. Now, let's back up a little; let's just talk about when you were down there in the store.

A. Well, I just testified—

Q. Well, let's go over it again. Did you suggest down in the store that they work on this floor and wall covering, Watson's men work when your men were not working on the job?

A. I did.

Q. And they—that first Sunday when they came out there, your men were not working on the job?

A. They were not.

Q. Now, did they come back and work the next day, Monday?

[fol. 150] A. I don't know whether they worked on Monday or not; I don't remember. There was one or two days there that they didn't come back, they claimed that they had work other places and that they couldn't do this and they couldn't do that.

Q. Let me ask you this question, Mr. Parker: Didn't you tell Mr. Stanley to let Watson's men come on out and work; that you talked it over with your men, it would be all right? I don't mean to be quoting your exact words, but didn't you tell him the substance of that?

A. When Mr. Stanley made the contract, I told him he could work it any way he wanted to work it.

Q. But you have already testified that you suggested they work on Sundays or other times when your men—

A. That's right; if they wanted to work on Sundays or nights or after we finished the job or before we finished the job.

Q. All right.

Now, let's get to the next question. After they came out and worked that Sunday, didn't you tell Mr. Stanley to let Watson's men come on out and work at the same time your men were working?

A. I told Mr. Stanley I didn't care when Watson's came out.

Q. And I believe the testimony here shows that they worked at least part of that Monday, the 18th of August, and then Tuesday and Wednesday would be the 19th and 20th, while your men were on the job; is that right?

A. Now, the Monday and Tuesday part of it, I don't know about the time that they worked and I don't remember about the amount of work that they put in on Monday and Tuesday. Well, let's see—Wednesday was—yes, I do, too; Tuesday, we started having trouble—the men wanted

to walk off the job on Tuesday. They worked one day after Sunday; my carpenters wanted to walk off the job on Tuesday, I believe it was, and packed up their tools, ready to go off.

Q. That was on Wednesday, wasn't it, the 20th?

A. No, that was on Tuesday, the day before Wednesday.

[fol. 151] Q. Well, now, let's see; Tuesday—

A. And I begged the men, on account of Mr. Stanley's wife's condition, to stay on the job and try to finish the job and get him into the house on account of her condition, and the men agreed to do it, see?

Q. Now, let's see if we can get this date straight, though.

A. This was on Tuesday before Wednesday.

Q. Well, now, what day of the week did the—Mr. Henderson come out there and the men did go off the job?

A. Well, now, I don't remember what day it was. You know what day it was; what day was it? It was the day before the day that Mr. Henderson come out there that the men packed their tools up.

Q. Well, Mr. Henderson came out on Thursday.

A. No,—well, the men packed their tools up on Wednesday, then.

Q. That's what I'm trying to get.

So they did work—there was no trouble started on Tuesday, then; it started the day before Mr. Henderson came out?

A. It started the day before Mr. Henderson come out. Mr. Henderson didn't know a thing in the world about the trouble of the day before.

Q. Now, what did Mr. Henderson say when he came out there, Mr. Parker?

A. Mr. Henderson came out on the job and I took him over and introduced him to Mr. Stanley.

Q. What did he—what conversation did you have with Henderson before you took him over and introduced him to Stanley?

Mr. Ward: May we have the date?

Trial Examiner Fitzpatrick: I think the record shows.

The Witness: Was that on Thursday?

By Mr. McRee.

Q. That was on Thursday.

A. Mr. Henderson was only out there on Thursday.

Q. Only out there one time?

A. One time, for about 30 minutes.

Mr. McRee: No dispute about that.

[fol. 152] The Witness: This is Thursday, isn't it?

Trial Examiner Fitzpatrick: Thursday. All right. I think the record shows that Thursday was the—

Mr. Ward: 21st of August.

Mr. McRee: 21st of August.

The Witness: 21st of August.

Now, what was it you wanted to know?

By Mr. McRee.

Q. When Mr. Henderson arrived on the job, you knew Mr. Henderson, didn't you?

A. I did.

Q. Knew he was Business Agent of the Local?

A. I did.

Q. And what was the conversation? What was the first thing Mr. Henderson said to you? What was the first thing you said to him?

A. I just spoke to him and—they wasn't any conversation.

Q. Wasn't any conversation? Did he tell you what he was out there for?

A. Well, I knew what he was out there for, because he'd been on other jobs.

Trial Examiner Fitzpatrick: Just answer the question.

The Witness: I knew what he was out there for.; he didn't say what he was out there for right then.

By Mr. McRee.

Q. All you had to do was just see Mr. Henderson drive up and you knew he was out there—

A. That's right.

Q. What did you know he was out there for?

A. He was either paying a friendly visit or we were doing something wrong.

Q. One of the two?

A. That's right.

Q. Did you ask him which it was?

A. Well, no, I was guilty; I knew what was wrong.

Q. You didn't even—he didn't say a thing to you; you just knew that he was out there to pull the job; is that right?

[fol. 153] A. No, he didn't — I knew he — I didn't — I wouldn't say pull the job; the job was never pulled.

Q. Never pulled?

A. No.

Q. But you just get the men to quit work; is that right?

A. No, the men know what to do, just like I do, see; a contractor, any contractor.

Q. Well, let's see. The men were working, of course, when Henderson came out there?

A. We were doing it for Mr. Stanley's wife's benefit.

Q. I'm not asking you what you were doing it for; just answer the question.

A. Yes, they were working, they were working with Watson's; yes, sir.

Q. And Watson's wasn't working that day, was they?

A. No.

Q. And why weren't they working that day?

A. I'd had trouble with the men the day before about working with Watson's men.

Q. And you had called up Mr. Smith and told him to pull his men off the job?

A. Can I explain that, Mr. Examiner?

Trial Examiner Fitzpatrick: Well, you can answer the question and then explain it.

The Witness: I called Mr. Smith and told him that the men were fixing to pack up their tools and quit the job on account of his men and I asked Mr. Smith as a personal favor if he would take his men off of the job and leave them off of the job, as I only had about three or four or five days' work left for my men to finish and if he would accommodate me to the extent of taking his men back and leaving them off until I finished my work and then him come on and finish his work. Mr. Smith faithfully promised me that he would do it.

By Mr. McRee.

Q. He did do it, then?

A. And he—he talked to his men there and his men went on. His men went on back to the office; and later on in the day, why, Mr. Smith's lawyer called me in re- [fol. 154] gard to the job. Now, the job never would have—I never would have had any trouble on the job, I'd have gone on—I could have gone on and finished the job if Mr. Smith had of kept his word with me in agreeing as a mutual agreement between Mr. Smith and me and akept the lawyers out of it, you see.

Q. Oh, the lawyer calling you is what caused this strike; is that it, Mr. Parker?

A. The lawyer called Mr. King and then the lawyer calls me and tries to get me to iron out the Union difficulties and Mr. Smith broke his promise with me; we'd have completed Stanley's house and the Union never would have been on—Mr. Henderson never would have been on the job and never would have known it if it hadn't been for the lawyers.

Q. Oh, I see. The fatal mistake was calling Mr. King, here, then? Is that what happened?

A. No, Mr. Chambliss.

Q. Mr. Chambliss called Mr. King; you say he called the Union lawyer, didn't you?

A. That's right; after he had agreed with me to go on and finish the house on account of Mrs. Stanley's condition.

Q. Well, let's back up and see what—all happened.

You called Smith and at that time one of his men, Mr. Pozzuto, this gentleman sitting right over here,—

A. That's it, exactly.

Q. (Continuing) —was out, on the morning of Thursday, August 21st; is that right?

A. That's right.

Q. And Mr. Smith told you "All right, I'll—I'll put my men off the job"?

A. He did.

Q. And then did he pull Mr. Pozzuto off the—

A. He did.

Q. Did Mr. Pozzuto come back out there that day?

A. No, but he sent his lawyers out there.

Q. Sent his lawyers?

A. I mean, had the lawyer call me. You can—Jac Chambliss.

[fol. 155] Q. Just answer my question. Mr. Pozzuto didn't come out there?

A. Didn't show up, no.

Q. Did any other employee of Watson's come on that job?

A. Nothing—no.

Q. Did—how did Mr. Smith, then, break his word to you?

A. Well, he—

Q. Just explain that for the record, sir.

A. He fulfilled his promise of Mr. Moore in the store down there, evidently, because they had already threatened to sue if we put Watson's on the job out there; I mean, if we didn't.

Q. Now, you're getting off a slightly different answer to my question.

Mr. McRee: I move that that be stricken.

By Mr. McRee.

Q. You understand my question?

A. Ask it again, please.

Mr. King: See if he does.

Mr. McRee: Just a minute.

By Mr. McRee.

Q. You made a statement here that Smith broke his word with you that day; if he hadn't broken his word with you, you wouldn't have had any trouble. You just explain that answer.

A. He did.

Well, Mr. Jac Chambliss called me that afternoon, Mr. Smith's lawyer, and asked me if I couldn't iron out the differences between Mr. Henderson and Mr. Smith. And I told Jac Chambliss that I had no control whatsoever over Mr. Henderson or Mr. Smith or anything about it, but I said, "I do wish one thing, that I wish that Mr. Smith would carry out his promise to me and save me all the embarrassment, that I would join the Hod Carriers Union if it would save all of this embarrassment to the contractors as well as the people, the clients that we were doing business with.

[fol. 156] Q. What promise did Mr. Smith fail to carry out to you at that time?

A. Well, if Mr. Smith had of kept his mouth shut and stayed away from Jac Chambliss, Mr. Henderson never would have known that Watson's was on the job, see?

Q. You think Jac Chambliss is the one that called Mr.—

A. He called the—the Union's lawyer, evidently, and got it all stirred up and so naturally, them working with non-union men, they came down—all we was trying to do was help Mr. Stanley out. Mr. Smith didn't carry out his promise; therefore, we had—

Q. That's what you mean he didn't carry out his promise; he shouldn't have mentioned it to his lawyer and his lawyer shouldn't have communicated with the Union lawyer; is that it?

A. Well, it's just the same old story, threatening, threatening, all the way through.

Q. Threatening?

A. Yeah.

Q. And what conversation—now just get back to when Henderson came out there, just what was said, what happened? You say, if I understand your testimony, he didn't say a thing to you; he just spoke to you and you knew he was out there because of this Watson deal and wasn't going to let your men continue working on the job; is that right?

A. That's right.

Q. And then you went over and what did—what did you do then?

A. Well, I took Mr. Stanley and I went to Mr. Stanley and told him that it was Mr. Henderson, the Business Agent of the Carpenters Local and I told him that we'd stuck our necks out and I guessed the men would quit—have to quit now.

Q. Have to quit?

A. Yeah, and I said, "I want you to come over here and meet Mr. Henderson and Mr. Rose." I said, "They're officials of the Local," and I said we'd put our foot in it. I said, "Let's go over and try to get it out." I took him over and introduced him to Mr. Henderson, introduced him [fol. 157] to Mr. Rose. And George got kind of excited about it and all nervous.

Q. Just don't characterize Mr. Stanley; you just tell us what happened.

Mr. King: I object to that. The man's telling what happened.

Mr. McRee: He's—

Trial Examiner Fitzpatrick: Proceed.

Mr. King: Said he was all excited.

The Witness: And Mr. Stanley—Mr. Henderson told Mr. Stanley, said "The men—"The Union men are out here working with non-union men," and says, "I've advised them and informed them to the fact that they are working with non-union men and that the Union men cannot work and will not work with non-union men on that job." and Mr. Stanley says, "Well," says, "What can I do?" And Mr. Henderson said, "I don't—I don't know; that's up to you, Mr. Stanley," said, "You brought on all the trouble" and said, "I can't iron out the differences," or something to that effect. And Mr. Stanley said something about that he had a brother belonging to the Union and that he was always favorable to the Union and that he wanted Union men to do the work and wanted to know if—he said that he had a contract with Watson's for approximately a thousand dollars to do the job, for the material and do the work, and he could not break the contract with Watson's and lose the thousand dollars. And he said, "Would you?" to Mr. Henderson. Mr. Henderson stated plainly, he said, "Mr. Stanley, I'm not out here," he said, "to try to break a contract with anybody." He says, "I haven't—we don't want to have nothing to do with breaking a contract with any—"

By Mr. McRee:

Q. Oh, he did mention breaking his contract but he advised him he wasn't out there to do it?

A. He said he wasn't out there to break any contract with anybody, said that was up to Mr. Stanley; whatever he did, that was his—that was none of his business. And Mr. Stanley said, "Well," he said, "What do you want me to do, then?" and Mr. Henderson said, "I don't know," [fol. 158] said, "The only thing about it is these Union men are not going to work with non-union men," and that was about all there was said.

Q. Well, did you point out, or did Mr. Stanley point out that you'd already sent the Watson's men off the job and they were not out there?

A. Well, I told—that was all—all of them knew it, Stanley and all the rest of them.

Q. I didn't ask you who knew it; I asked you what was said, Mr. Parker. Just answer the question.

A. Well, I told Mr. Henderson that I'd sent Watson's men off the job.

Q. What did he say then?

A. How's that?

Q. What did he say then? What did Henderson say?

A. Well, he just grunted.

Q. Just grunted.

Well, didn't—in this talk between Stanley and Henderson did Stanley say, "Well, Parker has already sent Watson's men off the job; they're not out here working now?

A. Well, they might have been something said, but it was too late then.

Q. Too late then; what do you mean, it was too late then?

A. Well, I'd had trouble the day before that Henderson come out there with the men wanting to go off the job. As I stated before in my testimony that we—me as a contractor and with some principle and human in me, owing to the condition of Mr. Stanley's wife, we agreed to go ahead through with the job and work with Watson's men on account of the condition of Mrs. Stanley.

Q. Yeah.

A. And complete the job.

Q. I understand.

A. Of which we did complete the job, Mr. Stanley took my men and completed my job, the Union men and the men that were on the job and completed his house and then took the men up here on Broad Street and finished the office [fol. 159] that he moved in down there. His house is complete.

* * * * * *

Re-direct examination.

By Mr. King:

Q. Just what was it you did after the job was closed down and after the 21st?

A. The Cavin brothers, the men that's been working with me for years, owing to the condition of Mrs. Stanley, went down there and finished that job unbeknownst to Jack. I

knew it; I didn't say a word. I didn't go on the job; unbeknownst to Jack Henderson, they finished Mr. Stanley's house and all the rest of the men down there, outside the electrician, and fulfilled their work with them, and Mr. Stanley's house was completed after the 21st by the same men that were on the job from the original date of the contract.

* * * * * *

DAN C. STEWART, a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Trial Examiner Fitzpatrick: Take a seat and give us your name.

The Witness: Dan C. Stewart.

Trial Examiner Fitzpatrick: And your address?

The Witness: 707 Moore Street.

Direct examination.

* * * * * *

By Mr. King:

Q. Are you a member of the Carpenters Local Union No. 74, United Brotherhood of Carpenters and Joiners of America?

A. I am.

Q. How long have you been a member?

A. Five or six years.

Q. And as such a member, were you continuously a member up to the present date—have you continued to be at all time up to now?

A. Yes, sir.

[fol. 160] Q. Were you a member on August 21st, 1947?

A. I was.

Q. Are you a former employee of Mr. Parker?

A. Yes, sir.

Q. Were you employed on the Stanley job at and prior to August 21st of this year?

A. Yes, sir.

Q. How long had you worked there up to the 21st of August, about?

A. Oh, about three or four days.

Q. And what was your type of work?

A. Floor work.
Q. Floor work?
A. Floor finishing.
Q. Floor finishing.
On the 21st of August, then, did you—were you present and did you overhear a conversation between Mr. Henderson and Mr. Stanley?
A. I did.
Q. On whose house you were working?
A. I did.
Q. State as much as you can remember of that conversation, please.
A. Well, just—I don't remember how he did start, now.
Q. Well, what do you remember hearing Mr. Henderson say to Mr. Stanley?
A. Well, he told Stanley that the job was being discontinued on account of labor, non-union work being done.

. . . . . .

By Mr. King:

Q. On the 21st day of August, the day that you left your job. Did you hear the conversation between Stanley—
A. That's the day we left—
Q. Yeah.
A. Yes, sir.
Q. Well, was there ever any other conversation there between Henderson and Stanley in your presence?
A. Not in my presence.
[fol. 161] Q. Did you ever know of him being out on the job before that day?
A. First time I knew of him being out there, the only time.
Q. I'll ask you whether or not—
Trial Examiner Fitzpatrick: Who are you referring to?

Mr. King: Referring to Mr. Henderson.

By Mr. King:

Q. State whether or not at any time during that conversation Mr. Henderson stated to Mr. Stanley that he would have to break his contract with Watson before you men would go back to work.

A. I never heard him ask him to break any contract with anyone.

Q. Well, was anything like that said?

A. If there was, I don't remember it, never heard it.

Q. Well, if it was said, would you have been—you were there; would you have heard it?

Mr. McRee: I object to that, Mr.—

A. Yes, sir.

Trial Examiner Fitzpatrick: The answer can stand.

By Mr. King:

Q. And if that had been said, would you have heard it?

A. Yes, sir.

* * * * * *

GEORGE T. LARKIN, a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Trial Examiner Fitzpatrick: Take a seat and give us your name, full name.

The Witness: George T. Larkin.

Trial Examiner Fitzpatrick: And your address?

The Witness: 707 Moore Street.

Trial Examiner Fitzpatrick: All right. Proceed.

[fol. 162] Direct examination.

By Mr. King:

Q. Mr. Larkin, are you a member of the Union?

A. Yes, sir.

Q. Respondent here?

Were you hired by Mr. Parker on the Stanley job?

A. Yes, sir.

Q. On or about—or on and up to August the 21st, 1947?

A. I was.

Q. Were you one of the men that had been there working there prior to that date?

A. We'd been there about four days.

Q. And—and do you remember the date you left?

A. The 21st.

Q. Uh-huh.

Now, then, when you left—or just prior to your leaving, did you hear a conversation between Mr. Henderson and Mr. Stanley?

A. I did.

Q. State as much as you can remember of that conversation.

A. Well, when I came out of the house, why, Mr. Parker, I think it was, was introducing him. I went on to the truck and put some tools I had up and came back, and Mr. Stanley was—he was doing the talking about the—well, he was telling all about the troubles he'd had with the job, and he just sold his house and had to—had to have a place to stay and was in a rush to get the job there completed. And he said if—said he stood to lose a thousand dollars or something like that—I don't remember what the words were—if he broke his contract with Watson's. And I—

Q. Did you hear Mr. Henderson say anything?

A. Mr. Henderson said that he wasn't interested in the contracts that anyone had.

Q. Did he tell him why his men were not going to work? Did you hear him tell him why the men wouldn't work?

[fol. 163] A. It was on account of there was non-union men working on the job.

Q. Now, state whether or not Mr. Henderson ever made any statement to Mr. Stanley to the effect that he would have to cancel his agreement with Watson's before our men would go back to work.

A. No, I didn't hear anything—

Q. Well, were you there?

A. I was there.

Q. Was that said? Did Mr. Henderson make such a statement as that?

A. No, sir.

Q. All right.

Now,—who were you working for out there?

A. I was working for Mr. Parker. Mr. Stewart and myself are partners.

Mr. McRee: Wait a minute; what was that answer?

The Witness: I say, Mr. Stewart and myself are partners in the hardwood floor business. We were working for Mr. Parker.

By Mr. King:

Q. Now, did you have a right to quit any time you wanted to under your working arrangement, if you wanted to quit your job?

A. Sure.

Q. And did you ever at any time during that period that you have described here work for or under the supervision of Mr. Stanley, or did you work under the supervision of Parker?

A. Mr. Parker is the man that called us to come to the job; we've done work for Parker before.

* * * * * *

Cross examination.

* * * * * *

Q. You were working out there up until the time Mr. Henderson came out the job, weren't you?

A. I was.

Q. You didn't quit working until after he got there?

[fol. 164] A. On that day, no.

Q. This floor finishing hadn't been completed when you and Mr. Stewart quit that 21st of August?

A. No, it wasn't completed.

Mr. McRee: That's all.

Trial Examiner Fitzpatrick: Anything further?

Mr. King: Wait a minute.

Re-direct examination.

By Mr. King:

Q. Did you state when you left the employ of Mr. Parker there?

A. Beg pardon?

Q. Did you state when you stopped working out there?

A. I don't believe I stated that.

Q. Well, when did you quit working out there?

A. The 21st of August.

* * * * * *

Trial Examiner Fitzpatrick: I'd like to say on the record for the benefit of counsel in the preparation of their briefs

that I am not prejudging this case; I'm going to give it all the attention I can. For their information now, I say that I'm very much concerned as to whether or not the picketing the evidence shows in this case did take place, starting some time in August prior to the effective date of the amendment to the Act, and continuing on probably a week after the effective date of that Act, constitutes a violation of Section 8 (b) 1 (A) and, if so, what kind of an order, cease and desist order, can or could be issued. If I understand the theory of the Board's counsel, in so far as the testimony adduced in support of the allegations of the Complaint, violation of Section 8 (b) 4 (A), it is roughly this: That the Union, having taken certain—by the Union, I'm referring to the Carpenters Local, having taken certain actions which amounted to removing their men from a job on August 21st, which action at that time was not illegal, but under the terms of the amendment to the Act, such type—let's assume such type of work later was illegal. I'm assuming it for the sake of the argument. . . .

. . . . . .

[fol. 165] Before the

NATIONAL LABOR RELATIONS BOARD

Tenth Region

Case No. 10-CC-1

In the Matter of LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., and JACK HENDERSON, individually and as agent for LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., and IRA A. WATSON, d/b/a WATSON'S SPECIALTY STORE.

COMPLAINT

(Board's Exhibit 1-B)

It having been charged by Ira A. Watson Company, d/b/a Watson's Specialty Store that Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and Jack Henderson, individually and as agent for Local 74, United Brotherhood of Carpenters and Joiners of America,

A. F. of L., herein sometimes called the respondents, have engaged in and are now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended by Public Law 101—80th Congress—Chapter 120—First Session, herein called the Act, the General Counsel of the National Labor Relations Board, hereinafter called the Board, on behalf of the Board, by the Regional Director for the Tenth Region as agent for the Board, designated by the National Labor Relations Board Rules and Regulations, Series 5, Section 203.15, hereby issues this Complaint and alleges as follows:

[fol. 166]

I.

The Ira A. Watson Company is and has been for many years a corporation duly organized and existing by virtue of the laws of Rhode Island. At all times mentioned herein, the company has maintained its principal office at Knoxville, Tennessee. It maintains and operates twenty-five retail stores dealing principally in salvage merchandise and located in various states of the United States.

II.

About February, 1947, the Ira A. Watson Company began the operation of a specialty store in Chattanooga, Tennessee, under the trade name and style of Watson's Specialty Store, herein called Watson's, which is now and has been continuously engaged since that date in the sale, distribution and installation of floor and wall coverings and related products.

III.

Watson's, in the course and conduct of its business operations, for the period from March to September, 1947, has purchased goods valued at approximately $72,000, of which approximately 33% represented purchases which were shipped to Watson's from states other than the State of Tennessee. In adition, Watson's purchased through a local distributor linoleum and related products which were manufactured in the State of Pennsylvania and transported to the local distributor in Chattanooga, Tennessee, at an approximate value of $43,800, or approximately 60% of its

total purchases. During the same period, Watson's sales and installation jobs amounted to approximately $73,000, of which about 8% represented sales and installations in states other than the State of Tennessee.

IV.

The respondent, Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., herein called the Union, is and has been at all times mentioned herein, a labor organization within the meaning of Section 2 (5) of the Act, with its principal office and place of business [fol. 167] at Chattanooga, Tennessee. The respondent, Jack Henderson, is and has been at all times mentioned herein, an agent of the Union, to-wit, its duly authorized business agent.

V.

About February, 1947, respondent Jack Henderson requested Watson's to execute a closed shop agreement covering Watson's installation employees with the Union, although the Union did not at that time or at any other time have any members among, or represent for the purposes of collective bargaining, any of Watson's installation employees. When Watson's refused to execute the proposed closed shop agreement, respondents placed a picket in front of Watson's place of business and declared that Watson's was unfair to the Union and that Watson's employed non-union employees.

VI.

The said picketing of Watson's as alleged in paragraph V above continued on and after August 23, 1947, until on or about August 30, 1947, for the purpose, and with the effect of restraining and coercing Watson's installation employees to join the Union.

VII.

On or about August 7, 1947, George D. Stanley and B. F. Parker, a general contractor, executed an agreement whereby Parker agreed to do certain work consisting of remodeling and improvements upon Stanley's residence in Lookout Valley, Chattanooga, Tennessee, including the furnishing of materials and employees. Stanley agreed to

pay the cost of materials and the wages of the employees plus a commission to Parker. Thereafter, Parker employed members of the Union to perform work on this residence.

VIII.

On or about August 15, 1947, Stanley entered into an agreement with Watson's whereby Watson's agreed to furnish and install certain floor and wall covering at Stanley's residence. In accordance with said agreement, em- [fol. 168] ployees of Watson's commenced the installation work on or about August 17, 1947. At the same time, members of the Union employed by Parker and/or Stanley were performing work at Stanley's residence pursuant to the agreement between Stanley and Parker.

IX.

On or about August 21, 1947, the Union, by its agents, including Jack Henderson, ordered, induced and encouraged members of the Union, in the course of their employment, to leave concertedly their employment at Stanley's residence and to refuse to perform services therein, an object thereof being to force or require Stanley to cease doing business with Watson's.

X.

The concerted refusal by members of the Union in the course of their employment to perform services as stated above, continued on and after August 23, 1947, and the Union and its agent, Jack Henderson, has refused at all times thereafter, to permit employee members to perform services for Parker and/or Stanley at said residence.

XI.

By the acts alleged in paragraph X above, and by each of said acts, respondents on and after August 23, 1947, have engaged in, and have induced and encouraged employees of an employer, namely Parker and/or Stanley, to engage in a concerted refusal in the course of their employment to perform services, an object thereof being to force or require said employer to cease doing business with another person, namely Watson's, and respondents thereby

did engage in and are engaging in unfair labor practices within the meaning of Section 8 (b), subsection (4)(A) of the Act.

XII.

By the acts alleged in paragraphs VI and X above, and by each of said acts, the respondents on and after August 23, 1947, have restrained and coerced and are restraining and coercing the employees of Watson's in the exercise of [fol. 169] rights guaranteed in Section 7 of the Act, and thereby did engage in and are engaging in unfair labor practices within the meaning of Section 8 (b), subsection (1)(A) of the Act.

XIII.

The activities of the respondents described above in paragraphs VI and X occurring in connection with the operations of Watson's described above in paragraphs I, II and III have a close, intimate and substantial relation to trade, traffic, and commerce among the several states and tend to lead, and have led, to labor disputes burdening and obstructing commerce and the free flow of commerce.

XIV.

The acts of respondents described above constitute unfair labor practices affecting commerce within the meaning of Section 8 (b), subsections (1)(A) and (4)(A) and Section 2, subsections (6) and (7) of the Act.

WHEREFORE, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 26th day of September, 1947, issues this Complaint against Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and Jack Henderson, individually and as agent for Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., respondents herein.

[fol. 170]

Before the

NATIONAL LABOR RELATIONS BOARD

Tenth Region

Case No. 10-CC-1

In the Matter of LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., and JACK HENDERSON, individually and as agent for LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L. and IRA A. WATSON COMPANY, d/b/a WATSON'S SPECIALTY STORE.

ANSWER AND MOTION

(Board's Exhibit 1-E)

(Sworn to October 6, 1947)

Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and Jack Henderson, individually and as agent for Local 74, in reply to the complaint herein, allege and move as follows:

I.

1. They admit the allegations in paragraphs IV, V, VII and VIII of the complaint, except that they aver that the members of the union were employed by Parker and not by Stanley.

2. They deny the allegations in paragraphs VI, XI, XII, XIII and XIV of the complaint.

3. As to the allegation in paragraphs I, II and III of the complaint, they deny any knowledge or information thereof sufficient to form a belief as to the truth thereof.

[fol. 171] 4. They deny the allegations in paragraphs IX and X of the complaint, except that the members of the union did, on or about August 21, 1947, refuse to continue at work in the Stanley residence with and alongside of non-union men employed by Ira A. Watson Company, that Jack Henderson at that time took the position and announced that members of the union would not continue so to work, and that such members and Jack Henderson there-

after continuously took the position that they would not work on the job in such residence with and alongside such non-union men.

II.

On or about September 22, 1947, Paul L. Styles, Regional Director of the Tenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, 10 Forsyth Street, Atlanta, Georgia, filed a petition allegedly for an injunction under Section 10 (1) of the National Labor Relations Act as amended, in the District Court of the United States, for the Southern Division, Eastern District of Tennessee, and obtained a rule thereon to show cause before said court on October 6, 1947, why a temporary injunction should not issue from the said court, enjoining and restraining Local 74 and Jack Henderson, individually and as such Local's agent from engaging in certain acts claimed to be in violation of the National Labor Relations Act as amended June 23, 1947, until such time as the National Labor Relations Board may finally adjudicate the matters presented by the present complaint to which the present answer is addressed. The date for the hearing of such motion has been adjourned by consent until October 13, 1947.

Local 74 and Jack Henderson have, in the proceeding in said Federal Court, filed a verified answer of which a true copy is hereto annexed marked Exhibit A and made a part of this answer. The allegations in such answer are true and they are hereby incorporated in the present answer and as part thereof as if they were reproduced at length herein.

[fol. 172] At the time of filing such answer in the aforesaid Federal Court, Local 74 and Jack Henderson also filed a motion in such court to dismiss the petition of the Labor Board, and such motion is returnable before the Federal Court on October 13, 1947. A true copy of the motion papers on such motion is hereto annexed and marked Exhibit B and made part of the present answer.

III.

Local 74 and Jack Henderson, therefore, request this Board to dismiss the complaint herein on each and all of the grounds enumerated in their aforesaid motion in the

Federal Court (Exhibit B hereto annexed) and on the further ground that the complaint herein is without merit and no order of this Board adverse to Local 74 and Jack Henderson is or would be justified. They also ask for such further and other relief as may be just.

Local 74 and Jack Henderson further plead that no action should be taken by this Board until final judicial determination of the proceeding instituted as aforesaid in the Federal Court in Tennessee; and they reserve the right to amend this answer after such determination takes place.

Herbert G. B. King, Attorney for Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L. and Jack Henderson, individually and as agent for Local 74, Chattanooga Bank Building, Chattanooga 2, Tennessee.

[fol. 173] *Duly sworn to by Jack B. Henderson (jurat omitted in printing.)*

[fol. 174] IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern Division, Eastern District Tennessee

No. 1177

PAUL L. STYLES, Regional Director of the Tenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, 10 Forsyth Street, Atlanta, Georgia,

Petitioner

vs.

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL, an Unincorporated Association, 518 Georgia Avenue, Chattanooga, Tennessee;

JACK HENDERSON, Individually and as Agent for LOCAL 74, UNITED BROTHERHOOD OF CARPONTERS AND JOINERS OF AMERICA, AFL, 518 Georgia Ave., Chattanooga, Tennessee,

Respondents.

ANSWER

(Board Exhibit 1-F)

The respondents, appearing by their attorney, Herbert G. B. King, and without prejudice to their pending motion

to dismiss the petition on specified grounds, make answer to the petition herein as follows:

I.

1. They deny each and all of the averments in paragraphs 5 and 8 of the petition, except that they admit that the particular employment project referred to in paragraph 8 was completed prior to the filing of the charge alleged.

2. The respondents deny each and all of the averments in paragraph 7 of the petition except that they are with- [fol. 175] out knowledge or information sufficient to form a belief as to the truth of the averments that the petitioner has investigated the charge and as to the truth of the averments in sub-paragraph (a) of paragraph 7; and except that the respondents admit the averments in sub-paragraphs (b) and (c) of paragraph 7; and except that as to the averments in sub-paragraph (d) of paragraph 7 the respondents are without knowledge or information sufficient to form a belief as to the truth of the averments that about August 15, 1947, Stanley entered into an agreement with the charging party of the character stated and that about August 17, 1947, the employees of the charging party commenced installation work in accordance with such agreement; and except that the respondents admit that the members of Local 74 employed at Stanley's residence and the respondents complained of the presence on the job of the non-union employees of the charging party and the members of Local 74 refused, on or about August 21, 1947, to work with non-union employees of the charging party in the residence of George D. Stanley in connection with the job of improving the interior thereof, that the respondent Henderson, acting for Local 74, took and announced the position that members of Local 74 should not so work with such non-union employees, and that the members of Local 74 so working in the residence of George D. Stanley refused to continue to work therein alongside such non-union employees, withdrew from the premises on or about August 21, 1947, and have since refused to work with non-union employees on such job.

II.

3. The respondents are members of the United Brotherhood of Carpenters and Joiners of America, AFL, which, for many decades, has been a labor organization consisting of numerous local unions and members of such local unions subject to its laws and usages. It and its locals and members are governed by a Constitution and set of Laws designed to promote the mutual interest of the members, to assist them in securing employment, to reduce the hours of daily labor, to secure adequate pay, to establish a weekly [fol. 176] payday and by legal and proper means to elevate the moral, intellectual and social conditions of all its members and to improve the trade. Such Constitution defines, and for many years has defined, the trade autonomy of the United Brotherhood of Carpenters and Joiners of America as consisting of the milling, fashioning, joining, assembling, erecting, fastening or dismantling of all material of wood, hollow metal or fiber, or of produces composed in part of wood, hollow metal or fiber, the laying of all cork and compo, and all other resilient floor covering, all shingles, the erecting and dismantling of machinery and the manufacturing of all wood materials, where the skill, knowledge and training of a carpenter are required, either through the operation of machine or hand tools; and as extending to the following divisions and sub-divisions of the trade, to wit: Carpenters and Joiners, Railroad Carpenters, Bench Hands, Stair Builders, Millwrights, Furniture Workers, Shipwrights and Boat Builders, Reed and Rattan Workers, Ship Carpenters, Joiners and Caulkers, Cabinet Makers, Casket and Coffin Makers, Box Makers, Bridge, Dock and Wharf Carpenters, Car Builders, Floor Layers, Underpinners and Timbermen, Pile Drivers, Shorers and House Movers, Loggers, Lumber and Sawmill Workers, and all those engaged in the running of woodworking machinery, or engaged as helpers to any of the above divisions or sub-divisions or the handling of material on any of the above divisions or sub-divisions.

4. Under this Constitution and jurisdiction, the United Brotherhood has had for many years, and still has, local unions composed in whole or in part of layers of coverings for floors and walls including imitation tile and resilient floor covering such as linoleum, etc. Such work was and is part of the jurisdiction of Local 74, and many members

thereof were and are competent and skilled therein. Throughout August 1947 there were sufficient members of Local 74, thus competent and skilled, who were available to do the laying of floor covering and the placing of imitation tile board in the residence of George D. Stanley.

[fol. 177] 5. By an agreement, dated August 4, 1947, and still in force, George D. Stanley contracted with B. F. Parker (a boss contractor under agreement with Local 74 to employ its members exclusively) whereby Parker agreed to do certain remodel and improvement work in Stanley's residence and to furnish a sufficient number of men on the job and material. Included in such work was the refinishing of all woodwork in the house, the sanding of all floors (except the bathrooms and kitchen), the paneling of various rooms, doors and hall, the placing of imitation tile board on the walls of bathrooms and kitchen, the moving of certain plumbing in bathrooms, etc.

Annexed to the petition herein as Exhibit 7 are copies of this contract and the specifications thereof.

6. Subsequently and after the making of this contract, George D. Stanley, under date of August 16, 1947, made a contract with Ira A. Watson Company; and the petition herein asserts that Exhibit A is a copy thereof. The body thereof reads:

> "We propose to furnish and install rubber tile and cove base in your kitchen and three bathrooms for the sum of $376.00 which includes sanding and removing old linoleum.
>
> We will furnish and install chromite wall covering in kitchen and two baths 4 ft. high for the sum of $400.00. It will be necessary for the walls to be a good, smooth, dry plaster before we can apply wall covering.
>
> In case you decide to have the third bath included for wall covering you may add $99.00 to above figure."

7. In the performance of the work under the aforesaid contract between Parker and Stanley, the employed members of Local 74 found themselves side by side with and required to work and cooperate with non-union employees of Ira A. Watson Company and hence found themselves, both directly and indirectly, working with non-union men on the same job and in furtherance of the same construction

and improvements, and further found that such non-union [fol. 178] men were doing work in the Stanley residence which was within the jurisdiction of Local 74 and of the United Brotherhood and which members of Local 74 were qualified and organized to do as aforesaid, to wit, the work of laying linoleum and installing imitation tile board.

8. For many years it has been and is a tradition, rule and practice of the United Brotherhood of Carpenters and Joiners of America that its members would not work on the same job with non-union employees, particularly where such job and the work thereon attempted to be performed by non-union employees fell within the aforesaid established jurisdiction of the United Brotherhood as declared in its General Constitution. Such tradition, rule and practice were adopted for the purpose of furthering the best interests of the Brotherhood and for promoting the welfare of the trade and the achievement of the Brotherhood's objects as above stated.

9. Throughout the month of August 1947 and for a long time prior thereto, Local 74 had, in furtherance of the Brotherhood's aforesaid tradition, rule and practice, a specific trade rule of its own to the effect that its members would not work with non-union men on a given job under the circumstances above stated.

10. In consequence, when the members of Local 74 employed by Parker to do the work under his aforesaid contract with Stanley found themselves working and required to work with non-union men (employed by the charging party) in the residence of Stanley and under the circumstances above stated, they and the respondent Henderson notified Parker and Stanley that the members of Local 74 would not continue so to work and would conform to the aforesaid tradition, rule and practice of the Brotherhood and local trade rule of Local 74; and, thereupon they withdrew from working in the residence of Stanley.

11. On information and belief, thereafter and prior to the filing of the charge alleged in the petition herein with [fol. 179] the National Labor Relations Board and prior to the filing of the petition herein, the non-union men employed by the charging party as aforesaid completed the work called for by the aforesaid contract between Stanley and the charging party, and Stanley also procured the com-

pletion of the remodeling and improvements in his residence.

12. The sole object and purpose of the members of Local 74 and of these respondents in thus declining to continue to work on the job in Stanley's residence with non-union men as aforesaid, was to conform to the aforesaid tradition, rule and practice of the Brotherhood and the aforesaid trade rule of Local 74. They were not asked or employed to perform any services as employees of the charging party; and their action as above stated did not have, as an object, forcing or requiring the charging party to join any labor organization or to cease using, selling, handling, transporting or otherwise dealing in any goods, articles or materials or forcing or requiring Stanley to cease doing business with the charging party or to restrain or coerce the employees of the charging party in the exercise of what is described in Section 7 of the National Labor Relations Act, as amended June 23, 1947, as rights guaranteed by that section.

III.

Wherefore, the respondents ask that the petition herein be dismissed with costs and the petitioner's motion for injunction be denied, on the following grounds:

1. Because of lack of jurisdiction in the Court over the subject matter.

2. Because the Court should not accept jurisdiction over the subject matter.

3. Because the matter stated in the petition is academic and moot, and a court of equity will not make a decree for the purpose of penalizing a defendant.

[fol. 180] 4. Because the petition fails to state a claim or case upon which relief can or should be granted.

5. Because the alleged facts set forth in the petition do not present a case within the general power of Congress to regulate commerce within the meaning of Article I, Section 8, subsection 3, of the Constitution of the United States.

6. Because if the alleged facts set forth in the petition constitute a violation of Section 8(b), sub-section (1) of the National Labor Relations Act as amended June 23, 1947, such statute affords no lawful basis for the petition, because such statute, or at least its appli-

cation to the alleged facts set forth in the petition, is unconstitutional and in violation of the First, Fifth, Tenth and Thirteenth Amendments to the Constitution of the United States, as abridging the freedom of speech, as depriving the respondents of liberty and property without due process of law, as exercising power not delegated to the United States by the Constitution, and as imposing involuntary servitude in a case where punishment for crime is not involved.

7. Because if the alleged facts set forth in the petition constitute a violation of Section 8(b), sub-section (4) (A) of the National Labor Relations Act as amended June 23, 1947, such statute affords no lawful basis for the petition, because such statute, or at least its application to the alleged facts set forth in the petition, is unconstitutional and in violation of the First, Fifth, Tenth and Thirteenth Amendments to the Constitution of the United States, as abridging the freedom of speech, as depriving the respondents of liberty and property without due process of law, as exercising power not delegated to the United States by the Constitution, and as imposing involuntary servitude in a case where punishment for crime is not involved.

8. Because there is no lawful power or jurisdiction in this Court to render a decree directing or com- [fol. 181] pelling union men (members of respondent Local 74) to work along with, or in association or cooperation with, non-union men upon, in, or about the same job or the same subject of construction.

9. Because there is no showing of substantial or irreparable injury to the charging party or that there is any need for injunctive relief or temporary restraining order pending the final adjudication of the National Labor Relations Board with respect to the subject-matter. Indeed, the facts admitted by the petition and the charging party demonstrate the complete absence of any substantial and irreparable injury or any need for injunctive relief or temporary restraining order pending final adjudication by the Board.

10. Because the petitioner has not sustained the burden of establishing, prima facie or otherwise, that there has been any violation by the respondents or any of

them of the provisions of the National Labor Relations Act as amended June 23, 1947, specified in the petition.

Herbert G. B. King, Attorney for Respondents, Chattanooga Bank Building, Chattanooga 2, Tennessee.

[fol. 182] IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern Division, Eastern District Tennessee

No. 1177

PAUL L. STYLES, Regional Director of the Tenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, 10 Forsyth Street, Atlanta, Georgia,

Petitioner

vs.

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL, an Unincorporated Association, 518 Georgia Avenue, Chattanooga, Tennessee;

JACK HENDERSON, Individually and as Agent for LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL, 518 Georgia Ave., Chattanooga, Tennessee,

Respondents.

PETITION FOR AN INJUNCTION UNDER SECTION 10 (1) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

(Board's Exhibit 1-G)

(Dated September 22, 1947)

To the Honorable District Judge of the Southern Division, Eastern District, Tennessee:

Your petitioner, Paul L. Styles, Regional Director and an officer of the National Labor Relations Board, herein referred to as the Board, for the Tenth Region, being the office thereof to whom the matter herein alleged has been referred, petitions this Court on behalf of the Board, pur-

suant to Section 10 (1) of the National Labor Relations Act, as amended, for appropriate injunctive relief pending [fol. 183] the final adjudication of the Board with respect to the matters pending before said Board, on charges duly investigated by your petitioner, and that this Court issue a rule directing the respondents named herein to show cause why such injunction should not be granted. As reasons therefor your petitioner respectfully shows as follows:

1. Petitioner, Paul L. Styles, is Regional Director for the Tenth Region, National Labor Relations Board, an agency of the United States Government, with offices at Atlanta, Georgia, which includes the city of Chattanooga, Tennessee, and files this petition for and on behalf of said Board.

2. Respondent, Local 74 of the United Brotherhood of Carpenters and Joiners of America, AFL (herein referred to as Local 74), is an unincorporated association and a labor organization within the meaning of Section 2 (5) of the National Labor Relations Act, as amended, and has its principal office at 518 Georgia Avenue, Chattanooga, Tennessee, within this judicial district.

3. Respondent Jack Henderson is a resident of Hamilton County, Tennessee, within this judicial district, and is, and at all times material herein, an agent of Local 74, to wit, Business Agent.

4. Respondents are, and have been at all times material, engaged in promoting and protecting the interest of employee members of Local 74 in this district.

5. Jurisdiction for this action is conferred upon this Court by Section 10 (1) of the National Labor Relations Act, as amended June 23, 1947 (Public Law 101, 80th Cong., Ch. 120, 1st Sess.), herein referred to as the Act.

6. On or about August 29, 1947, Ira A. Watson Company, a corporation doing business as Watson's Specialty Store (herein referred to as the charging party) pursuant to the provisions of the Act, filed a charge, as amended, about September 15, 1947, alleging that the respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(b), subsections 1 and [fol. 184] 4(A) of the Act. A copy of said amended charge is attached hereto, marked Exhibit 1, and made a part hereof. The matter was thereafter duly referred to peti-

tioner as Regional Director for the Tenth Region of the Board for the purpose of investigating said charge.

7. Petitioner has investigated said charge. After such investigation, petitioner has reasonable cause to believe such charge is true and that a complaint of the Board based thereon should issue against respondents. More Specifically, and as appears from the affidavits of A. D. Smith, George D. Stanley, R. S. Freeman, H. W. Bullard and Dennis Pozzuto attached hereto marked Exhibits 2, 3, 4, 5, 6, respectively, petitioner has reasonable cause to believe that respondents have engaged in conduct in violation of Section 8(b), 1, 4(A) affecting commerce within the meaning of the Act, as follows:

(a) The charging party is engaged in the business of selling and installing floor and wall coverings, paints and venetian blinds in Chattanooga, Tennessee (Exh. 2). For the period from March to September 1947, the charging party purchased goods valued at about $72,000. Of this amount, approximately $24,000, or about 33 per cent, represented purchases, principally asphalt and rubber tile, in Georgia and Maryland, the goods being shipped directly from those States to the charging party. In addition, the charging party purchased, through a local distributor, linoleum, manufactured in Lancaster, Pennsylvania, and transported to Chattanooga, Tennessee, in the approximate value of $43,800, or about 60 per cent of the amount of its total purchases. During the same period, the charging party's sales and installation jobs amounted to about $73,000, of which approximately $6,200, or about 8 per cent, were shipments and installations outside the State of Tennessee.

(b) In February 1947, respondent Jack Henderson requested the charging party to execute a closed shop agreement, covering the charging party's installation employees, with Local 74, although Local 74 did not at that time, or any other time, have as members, or represent for the [fol. 185] purposes of collective bargaining, any of the charging party's installation employees (Exh. 2, 5, 6). When the charging party refused to execute the proposed closed shop agreement, respondents placed a picket in front of its place of business declaring the charging party was unfair to Local 74, and maintained said picket until August 30, 1947 (Exh. 2, 5, 6).

(c) On or about August 7, 1947, George D. Stanley and B. F. Parker, general contractor, executed an agreement whereby Parker agreed to do certain work, consisting of remodeling and improvements, upon Stanley's residence in Lookout Valley, Chattanooga, Tennessee, including the furnishing of materials and employees (Exh. 3, 7). Stanley agreed to pay the costs of materials and the wages of the employees, plus a commission to Parker (Exh. 3, 7).

(d) Thereafter, about August 15, Stanley entered into an agreement with the charging party wherein the charging party agreed to furnish and install certain floor and wall coverings at Stanley's residence for the approximate sum of $875 (Exh. 2). In accordance with said agreement the employees of the charging party, about August 17, commenced the installation work (Exh. 2, 5, 6). At the same time, members of Local 74, were performing work at Stanley's residence pursuant to the agreement between Stanley and Parker (Exh. 2, 4, 5, 6). About August 20, one of the members complained of working with the non-union employees of the charging party but Parker persuaded them to remain at work (Exh. 2, 4, 5, 6). The following day, the employees of the charging party, after working a short time were ordered off the job by Parker, acting under pressure by Local 74 and Henderson, because they were not members of Local 74, and Parker also notified Local 74 and Henderson of the action thus taken (Exh. 3, 4, 5, 6). The same day, members of Local 74, acting under orders from Jack Henderson as Business Agent, concertedly left their employment at Stanley's residence and refused to perform services therein (Exh. 3, 4). That afternoon, Henderson advised Stanley that he had ordered all members of Local 74 to concertedly cease work on Stanley's house for the [fol. 186] reason that Henderson would not permit members of Local 74 to work with non-union employees of the charging party (Exh. 3). Henderson further advised Stanley that he would not permit members of Local 74 to return and complete their work unless and until Stanley cancelled his agreement with the charging party, which Stanley refused to do (Exh. 3). Respondents have at all times since August 21 refused to permit their members to perform any services at Stanley's residence because of Stanley's refusal to cancel his agreement with the charging party, although

Stanley has, through Parker, requested respondents to allow members of Local 74 to return to work (Exh. 3).

(e) By the foregoing conduct, respondents, on and after August 23, 1947, have engaged in and have induced and encouraged employees of an employer to engage in a concerted refusal, in the course of their employment, to perform services, an object thereof being to force or require an employer to cease doing business with another person, namely, the charging party, in violation of Section 8 (b), subsections (1) and (4)(A), and Section 2 (6) and (7) of the Act.

8. Although the particular employment project on which the employees were engaged when the violation above set forth occurred was completed, despite the action of the respondents after August 23, 1947, it may fairly be anticipated that respondents will continue in the future, as they have in the past, to require employees to cease performing services for employers or other persons who do business with the charging party. It is therefore essential for the purpose of effectuating the policies of the Act and in accordance with the provisions of Section 10 (1) thereof, and appropriate and just and proper that, pending adjudication by the Board of the matter herein, the respondents, and each of them, be enjoined and restrained from the commission of the acts above alleged, or repetitions thereof.

[fol. 187] Wherefore, petitioner prays:

1. That the Court issue a rule directing Local 74, United Brotherhood of Carpenters and Joiners of America, AFL, and Jack Henderson, and each of them, to appear and show cause before this Court, at a time fixed by the Court, why an injunction should not issue enjoining and restraining respondents, and each of them, and their agents, servants, employees and attorneys, and all persons in active concert or participation with them, pending final adjudication by the Board of such matters from:

(a) Engaging in, or inducing or encouraging the employees of George D. Stanley and/or B. F. Parker to engage in, a strike or a concerted refusal in the course of their employment, to perform any service in order to force or require George D. Stanley and/or B. F. Parker to cease doing business with Ira A. Watson Company, doing busi-

ness as Watson's Specialty Store, the charging party herein, Chattanooga, Tennessee.

(b) Engaging in, or inducing or encouraging the employees of George D. Stanley and/or B. F. Parker to engage in, a strike or a concerted refusal in the course of their employment to perform any service, or in any like manner restraining, preventing or interfering with the sale of the charging party's merchandise to George D. Stanley or the installation thereof, at his residence.

(c) Engaging in, or inducing or encouraging the employees of any other employer to engage in, a strike or a concerted refusal in the course of their employment to perform any services where an object of said action is to force or require any employer or other person to cease doing business with Ira A. Watson Company, doing business as Watson's Specialty Store, Chattanooga, Tennessee.

2. That upon return of the rule the Court issue an order enjoining and restraining respondents, and each of them, in the manner set forth above.

3. That the Court grant such other and further relief as may be just and proper.

[fol. 188] Dated at Chattanooga, Tennessee, this 22nd day of September 1947.

(s) Paul L. Styles, Regional Director for the Tenth Region, National Labor Relations Board; Robert N. Denham, General Counsel; David P. Findling, Associate General Counsel; Winthrop A. Johns, Attorney, Reeves R. Hilton, Attorney, National Labor Relations Board, 815 Connecticut Avenue, N.W., Washington 25, D. C.

Duly sworn to by Paul L. Styles (jurat omitted in printing.)

[fol. 189] BOARD'S EXHIBIT No. 2A

List of Suppliers Who Ship Directly to Watsons From Other States.

Name Address	Total Purchases
Armstrong Cork Co. Lancaster, Pa.	$ 1,754.17
American Tile & Rubber Co. Trenton, N. J.	643.80
Artcraft Blind Co. Pittsburg, Pa.	51.34
Chenille Rug Co. Minneapolis, Minn.	210.33
Columbia Mills New York, N. Y.	215.27
Crown Venetian Blind Co. Baltimore, Md.	3,474.10
Cerf Bros. Bag Co. St. Louis, Mo.	129.60
Chromite Co. Monroe, Mich.	2,004.87
Donley Paint Co. Cleveland, Ohio	1,502.97
DuraFlex Corp. Baltimore, Md.	2,676.70
E. I. DuPont Co. Fair Field, Conn	298.00
Decatur Chemical Co. Decatur, Ga.	40.20
Free State Rug & Lino. Co. Baltimore, Md.	6,119.79
Hayes Adhesive Co. St. Louis, Mo.	39.81
Haynes Product Co. Omaha, Nebraska	165.58
Hanna Paint Co. Columbus, Ohio	3,319.68
[fol. 190]	
Moore Business Forms Atlanta, Georgia	$ 245.38

Name Address	Total Purchases
Oak Specialty Co. Chicago, Illinois	60.00
Peaslee Gaulbert Corp. Louisville, Ky.	1,533.18
Perfo Mat & Rubber Co. New York, N. Y.	35.82
George F. Richardson Co. Atlanta, Georgia	3,695.82
Rome I[illegible]riors Rome, [illegible]	134.40
Roberts Co. Los Angeles, California	53.25
Southeastern Distributors Atlanta, Ga.	447.30
Walter E. Selck Co. Chicago, Illinois	778.65
S. & W. Moulding Co. Columbus, Ohio	40.50
South Atlantic Floor Covering Co. Richmond, Va.	108.13
Thomas Moulding Floor Covering Co. Chicago, Illinois	1,011.51
Youngstown Mfg. Co. Youngstown, Ohio	732.00
Dura Test Corp. North Bergen, N. J.	71.25
Devoe & Reynolds Co. Louisville, Ky.	165.91
Industrial Electronics Newark, N. J.	6.70
	$31,766.01

Mdse. brought from Old Store
$33,801.92

[fol. 191]

BOARD'S EXHIBIT NO. 2-B

Out of State Sales

Date	Name	Address	Amount
9-6-47	Marvin Nolan	Rossville, Ga.	$63.00
8-22-47	W. D. Oliver	Flintstone, Ga.	297.00
5-16-47	Offeuts Rest	Calhoun, Ga.	399.49
9-4-47	Mr. Grady Price	Ft. Payne, Ala.	125.00
5-2-47	Mrs. Ed Raulston	Bridgeport, Ala.	105.00
10-16-47	Dr. C. H. Richie	Valley Head, Ala.	265.50
10-6-47	W. E. Talkington	Rossville, Ga.	71.20
9-27-47	J. R. Wallace	Chattanooga Valley Georgia	124.70
9-20-47	J. C. Williams	Ringgold, Ga.	49.50
8-24-47	W. B. Wilson	Flintstone, Ga.	84.00
5-31-47	Mrs. Forrest Walker	Chickamauga, Ga.	85.00
5-29-47	Kate Carvin	Menlo, Ga.	31.50
3-27-47	W. E. McGuffery	Fackler, Ala.	14.95
5-23-47	Mr. Keys	Lakeview, Ga.	9.95
6-15-47	Mrs. Shields	Murphy, N. C.	330.00
5-28-47	Chateau Club	Lookout Mtn., Ga.	56.20
10-14-47	F. N. Belk	Wildwood, Ga.	93.00
9-10-47	Carolyn Chenille Co.	Dalton, Ga.	158.00
10-21-47	Will Baker	Dalton, Ga.	303.40
10-20-47	Mrs. Swann	Dalton, Ga.	149.50
10-15-47	Mrs. E. O'Donnell	Boyington, Ga.	63.50
6-26-47	F. N. Belk	Wildwood, Ga.	150.00
8-25-47	Joe McGinnis	Lula Lake, Lookout Mtn., Ga.	150.30
6-17-47	George A. Mornton	Lookout Mtn., Ga.	139.20
6-6-47	Burk's Lakeview School	Lakeview, Ga.	54.40
8-27-47	Mrs. Pearl Bowman	Boynton, Ga.	92.50
7-19-47	Benham Underwear Co.	Scottsboro, Ala.	253.67
7-23-47	Dr. Robert Baldwin	Dalton, Ga.	82.50
4-10-47	Mrs. J. C. Brooker	Dalton, Ga.	70.50
5-8-47	Dorsey Service Station	Ringgold, Ga.	24.00
7-1-47	James C. Case	Trenton, Ga.	99.00
4-4-47	Mrs. Chandler	Chickamauga, Ga.	82.70
9-3-47	M. T. Couch	Chickamauga, Ga.	154.25
9-25-47	C. B. Daniels	Dalton, Ga.	222.00
8-18-47	J. R. Gilbert	Lafayette, Ga.	158.00
6-14-47	George Gerrin	Rising Fawn, Ga.	403.95

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8-23-47	F. J. Horn	Trenton, Ga.	129.50
8-6-47	B. M. Henry	Flintstone, Ga.	85.25
5-30-47	G. L. Heard	Cooper Heights, Ga.	94.00
4-29-47	N. C. Holt	Dalton, Ga.	55.00
8-7-47	Dr. Kerr	Dalton, Ga.	183.15
7-29-47	Mrs. John Looper	Dalton, Ga.	74.69
9-8-47	E. L. Lawson	Chattanooga Valley Georgia	30.88
9-25-47	W. A. Lance	Ringgold, Ga.	149.40
10-14-47	Essie Maynard	Dalton, Ga.	62.00
9-18-47	C. T. Murphy	Lakeview, Ga.	107.80
7-19-47	Dalton Theatre	Dalton, Ga.	88.00
4-22-47	D. Massey	Lakeview, Ga.	75.60
4-9-47	Arnold Massey	Rossville, Ga.	92.50
3-18-47	J. B. McCullagh	Chickamauga, Ga.	92.55
4-7-47	Mrs. C. H. Kimball	Peter Pan Rd. Lookout Mtn., Ga.	37.50
8-9-47	Mrs. Chess Hogshead	Hardy Road Lookout Mtn., Ga.	73.00

Date	Name	Address	Amount
4-12-47	Gus Chamberlain	Elfin Rd. Lookout Mtn., Ga.	$71.50
7-28-47	W. E. Falkner	Rock City Trail Lookout Mtn., Ga.	99.90
6-12-47	S. T. Walker	Lula Lake Rd. Lookout Mtn., Ga.	43.00
10-10-47	I. S. Van Dusen	Lula Lake Rd. Lookout Mtn., Ga.	36.50
Sept. 4	Mrs. J. E. Thorpe	Crossville, Ala.	14.85
Sept. 30	Miss Irene Clements	Chickamauga, Ga.	19.90
Sept. 15	—Amos Font	Crossville, Ala.	134.00
Oct. 14	Olan Mills	Birmingham, Ala.	772.50
Oct. 9	T. H. Carson	Flintstone, Ga.	25.96
Oct. 10	—Jerry Shapiro	Dalton, Ga.	400.00
6-30-47	R. P. Fricks	Rising Fawn, Ga.	9.95
10-14-47	Pine Tree Inn	Lafayette, Ga.	7.50
7-12-47	D. E. Stello	Rising Fawn, Ga.	15.50
8-15-47	J. R. Carson	Rising Fawn, Ga.	23.76
8-14-47	Leroy Reece	Cedar Grove, Ga.	28.75
	Complete Total		$8,045.75

[fol. 193] BOARD'S EXHIBIT No. 2-C

Merchandise Shipped Out

	Amount
Ira A. Watson Co. Knoxville, Tennessee	$ 50.67
Ira A. Watson Co. Pulaski, Va.	79.03
Ira A. Watson Co. Knoxville, Tennessee	103.29
Ira A. Watson Co. Pulaski, Va.	74.63
Ira A. Watson Co. Pulaski, Va.	12.80
Ira A. Watson Co. Pulaski, Va.	117.23
Ira A. Watson Co. Mt. Airy, N. C.	82.54
Ira A. Watson Co. Pulaski, Va.	155.27
Ira A. Watson Co. Newport, Tenn.	90.00
Ira A. Watson Co. Pulaski, Va.	108.00
Ira A. Watson Co. Bluefield, W. Va.	100.47

Merchandise Shipped Out

	Amount
Ira A. Watson Co. Mt. Airy, N. C.	108.81
Ira A. Watson Co. Sylacauga, Ala.	44.49
Ira A. Watson Co. Sylacauga, Ala.	35.00
Ira A. Watson Co. Pulaski, Va.	238.04
Ira A. Watson Co. Pulaski, Va.	421.85
Ira A. Watson Co. [fol. 194] Pulaski, Va.	375.00
Ira A. Watson Co. Elizabethan, Tenn.	7.56
Ira A. Watson Co. Pulaski, Va.	$ 5.50
Ira A. Watson Co. Franklin, Tennessee	160.63
Ira A. Watson Co. Knoxville, Tennessee	9.80
Total	$2,380.61

BOARD'S EXHIBIT NO. 2-D

Mfgs., Etc.

May 7, 1947	American Brake Shoe Co. 1814 Grove St.	$209.50
August 2, 1947	Corley Mfg. Co. Clifton Hills	86.00
August 21, 1947	Carolyn Chenille Co. Main St.	84.50
April 25, 1947	Corley Mfg. Co. Clifton Hills	339.70
May 19, 1947	Fleetwood Coffee Co. 246 E. 11th St.	507.30
July 7, 1947	Ross Mehan Fdry. 1601 Carter Street	23.80
June 2, 1947	Greyhound Bus Station Market St.	77.50
May 1947	American Brake Shoe Co.	10.03
July 25, 1947	Andrew's Textile Co. 1259 Market St.	100.00
	Total	$1,438.33

[fol. 195] BOARD'S EXHIBIT No. 3

August 15, 1947

Copy

Mr. George Stanley
1316 Hamilton National Bank Bldg.
Chattanooga, Tennessee

Dear Mr. Stanley:

We propose to furnish and install rubber tile and cove base in your kitchen and three bathrooms for the sum of $376.00 which includes sanding and removing old linoleum. We will furnish and install chromite wall covering in kitchen and two baths 4 ft. high for the sum of $400.00. It will be necessary for the walls to be a good, smooth, dry plaster before we can apply wall covering.
In case you decide to have the third bath included for wall covering you may add $99.00 to above figures.

Yours truly,

A. D. Smith

ADS:jz
Approved & O.K. by
Geo. D. Stanley
8-16-47

[fol. 196] BOARD'S EXHIBIT No. 4

Building Agreement

For and in consideration of the mutual promises and agreements herein contained we, George D. Stanley and B. F. Parker, both of Chattanooga, Tennessee, do this the 4th day of August, 1947, contract one with the other upon the following terms and conditions:

1—B. F. Parker agrees to do certain remodel work in and to the residence of George D. Stanley, located about eight miles south of Chattanooga on the old Birmingham highway and in Lookout Valley, Hamilton County, Tennessee. The remodeling and improving on said residence shall be done all in accordance with the attached list and specifications and are here referred to and made a part of this con-

tract. The work shall be done according to the best approved standards and all work shall be done in a good workmanship way and manner.

2—B. F. Parker agrees to begin this work immediately upon the execution of this contract. To furnish a sufficient number of men on the job and material and to diligently pursue the work continually until it is fully completed and he further agrees that in no event will he be longer than August 15, 1947, in fully completing the work.

3—George D. Stanley will pay all cost of all materials necessary to do the work and actually used in the residence and will pay the wages of all carpenters and other workers for actual time spent on the job and in addition to this will pay B. F. Parker ten percent of the cost of the materials, labor and other expenditures necessary for the completion of the job such as workmen's compensation, plumbing, paper, etc.: In consideration of this ten percent B. F. Parker agrees to execute close supervision over the work at all times and will devote whatever time he can to actually working on the job all for the ten percent herein mentioned. The amount of wages paid the workmen on the job shall not be more than the usual wage scale paid men in this vicinity to do this type of work. At each payday, the wages of the workmen will be paid by George D. Stanley [fol. 197] and a receipt taken from each man. These payments will be made on behalf of Parker and at the same time Stanley will pay to Parker the amount of withholding taxes, social security, etc.: that is deducted from each workman's wages. Stanley will likewise pay all material bills paying therefore, the exact cost of such material less any and all discounts that Parker will be able to obtain on all materials used on the job. All lumber used shall be thoroughly and completely seasoned.

4—Parker will at all times keep Stanley or his authorized representative informed of the details of the amount of materials purchased and the amount used on this job, as well as keeping Stanley or his representative informed of the wages being paid the various workmen on the job. The bills of all sub-contractors will be paid directly by Stanley upon the same basis as herein set out on the wages of the workmen.

5—Either party to this contract may terminate it by giving the other party a twenty-four hours written notice of his intentions to so terminate the contract and in case the contract is terminated under this clause by either party, Stanley shall pay Parker ten percent of the cost of the materials actually used on the residence, and ten percent of the labor up until the time of the termination of the contract and shall not be obligated to Parker for any other payments. Parker, in case the contract is terminated, shall likewise be under no other obligation to Stanley.
In witness whereof both parties hereunto set their hands on the day and date herein mentioned.

(s) B. F. Parker
(s) Geo. D. Stanley

Witness: (s) R. S. Freeman

The following is a list of the alterations and work to be done on the residence of George D. Stanley, located on Wahatchie Pike, Hamilton County, under a contract between George D. Stanley and B. F. Parker, dated August 4, 1947:

[fol. 198] All woodwork in entire house to be refinished, all floors to be sanded, except the bathrooms and kitchen. Dining room walls to be paneled with knotty pine paneling, all woodwork in diningroom to be lightened and refinished including beams, also two china cupboards to be built in out of pine paneling, stairs leading from the diningroom and upper hall to be paneled.

One bedroom upstairs to be paneled, one bathroom, linen closet, clothes closet to be added, clothes closet to have sliding doors, bathroom fixtures must be grade A plumbing and include a combination tub and shower, walls to be imitation tile halfway, the remainder plastered or paneled. The walls of the present bath upstairs shall also be imitation tile half-way and the remainder plastered or paneled. The two upstairs bedrooms and hall between to be papered. The tub in present upstairs bathroom to be moved forward to make space for additional closet in Master bedroom and to be plastered and refinished throughout. Door to be moved in Master bedroom to make room for additional door to enter new bathroom.

The downstairs hall and dinette to be paneled, door leading into hall from the downstairs bath to be closed completely and included in the paneling. Door to be cut between den and bath.

Kitchen back porch wall to be completely removed thereby enlarging the entire kitchen and metal cabinets and workshelves to be added. Walls to be finished in either plaster or tile board, to be specified. Present doors and all floors in the house to be sanded and finished. On the doors and woodwork clear varnish is to be used.

Roof to be checked for leaks and repaired if necessary. All doors and windows to be checked.

Heat registers to be replaced where necessary and checked by a competent person.

[fol. 199] IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Cause Argued and Submitted

(January 30, 1950—Before: Hicks, Chief Judge; Allen and Martin, Circuit Judges)

This cause is argued by Albert M. Dreyer for petitioner and by Charles H. Tuttle for respondent and is submitted to the Court.

IN UNITED STATES COURT OF APPEALS

DECREE—Filed April 4, 1950

On Petition to enforce an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On Consideration Whereof, it is now ordered, adjudged and decreed by this Court that the order of the National Labor Relations Board be enforced as prayed for in its petition.

[fol. 200] Before Hicks, Chief Judge, Allen and Martin, Circuit Judges.

OPINION—Filed April 4, 1950

Martin, Circuit Judge. The National Labor Relations Board seeks enforcement of its order directing Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and its business agent, Jack Henderson, to "cease and desist from engaging in or inducing the members of Local 74 to engage in a strike or a concerted refusal in the course of their employment to perform services for any employer, where an object thereof is to require any employer or other person to cease doing business with Ira A. Watson, doing business as Watson's Specialty Store."

The authority for issuance of the Board's order is rested upon the following provisions of section 8(b)(4)(A) of the Labor Management Relations Act of 1947 [61 Stat. 136, 29 U. S. C. A., Supp. 1, section 141, et seq.]: "Sec. 8 . . . (b) it shall be an unfair labor practice for a labor organization or its agents— . . . (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person: . . . " [158 (b)(4)(A), Title 29, U. S. C. A.]

The Labor Board adopted the finding of the trial examiner that the respondent labor union and its business agent violated this section of the United States Code by participating in and inducing a strike at the residence of George D. Stanley near Chattanooga, Tennessee, with an objective of forcing him to cease doing business with Ira [fol. 201] A. Watson Company, operating under the trade name "Watson's Specialty Store", which was found to be engaged in interstate commerce within the meaning of the Act.

In acting upon the petition of the Labor Board, this court must adhere to the mandate of Congress that the findings of the Board with respect to questions of fact, if

supported by substantial evidence on the record considered as a whole, shall be conclusive. See section 10(e) of the Act; sec. 160 (e), 29 U. S. C. A.

The Ira A. Watson Company operates some 26 or 27 retail stores in seven different states. In February, 1947, it discontinued its general retail store in Chattanooga, Tennessee, and in March of that year opened Watson's Specialty Store, specializing, as a part of its operations, in the sale and installation of floor and wall coverings. From March to September, 1947, the Watson store purchased goods valued at approximately $93,000, of which some thirty-three percent represented purchases shipped to it in Chattanooga from states other than Tennessee, around thirty percent was material purchased through local sources but manufactured outside the state and shipped to distributors in Tennessee, and approximately thirty-five percent represented stock received from the closed Chattanooga general store. Most of such stock originated outside Tennessee. Watson's sales and installation jobs during this period amounted to around $100,000, whereof an approximated eight percent represented sales and installations in states other than Tennessee.

When Watson's Specialty Store was first opened, respondent Henderson, business agent for Local 74, tried to persuade Watson's installation employees to join the union; but they refused. Thereafter, Henderson requested Smith, manager of the store, to execute a closed shop contract with Local 74 as the bargaining agent of the installation employees. This, the store manager refused to do for the reason that the employees were not union members. Whereupon, the union began to picket the store. Though the picketing was conducted by persons not in the employ [fol. 202] of Watson's, the Labor Board held that it was not unlawful.

Early in August, 1947, while the picketing was in progress, Stanley, who had purchased an old residence some eight miles from Chattanooga, contracted with D. F. Parker to improve and renovate the house. The contract provided that Parker should furnish the material and sufficient workmen to complete the job not later than August 15, 1947. Stanley obligated himself to pay the wages of the workers and the cost of necessary material,

and to pay Parker a commission of ten per cent of the cost of such items and other expenditures necessary for the completion of the job.

All workmen hired by Parker were union members, including carpenters who were members of Local 74. In the course of the renovation, it became necessary to select floor and wall coverings for the house and neither Parker nor Stanley was able to find the type of coverings satisfactory to Stanley at any establishment in Chattanooga except Watson's store, which insisted upon installing the coverings sold by it. Parker discussed with Stanley the complications that might arise with the union employees if Watson's non-union men should install the coverings, with the result that it was agreed that Watson's men should do their work when the union men were off duty. Stanley then entered into a contract by letter with Watson's store for the purchase and installation of the floor and wall coverings.

The installation work was started on Sunday, August 17, when there were no union workers present. However, on the ensuing Monday, Tuesday and Wednesday, Watson's employees continued the installation during regular working hours when the union men were also on the job. On Thursday morning, August 21, Watson's store, at Parker's request, took its men off the job. Despite this, Business Agent Henderson appeared at the Stanley place Thursday afternoon and told the four union carpenters then working that they could not continue to work with non-union men, or where non-union men were employed. The union carpenters left the job that afternoon and did [fol. 203] not return. Stanley sought unsuccessfully to have Henderson countermand his instructions. The Board found that, "according to Stanley's credible testimony, Henderson suggested that Stanley cancel his contract with Watson as a means of getting the carpenters to return to work."

There was substantial evidence to support this finding, for Stanley testified that, in appealing to Henderson on the spot to let the union carpenters finish the job, he begged: "Just what will I have to do? I'm willing to do anything to get into this house. I haven't a place to live and I've paid for this house and my wife's health

is in bad condition and we need to get in." To this importunity, he swore that the union's business agent replied: "Go—if you cancel your contract with Watson and get union men to to [sic] your job, we'll go back to work." And, on cross-examination, Stanley testified that when he asked Henderson what he could do to get the business agent of the union to let his men finish the job, Henderson replied: "If you cancel your contract with Watson's." When pressed, Stanley stood fast to his statement that these were the "exact words" Henderson used. He stated positively that cancellation of his contract with Watson was the final condition imposed by Henderson under which "he would allow his men to continue the job."

Two or three days later, the men from Watson's store returned to the job and completed their work about August 28. All the renovating of the Stanley house was completed by the end of the month. The unfinished carpentry was, at the urgent request of Parker, completed by two of the four union carpenters who had been on the job. They did this completion work without the knowledge or consent of the respondents.

The Labor Board held that Watson's, a large chain store operating in seven states, is, as was found by the trial examiner, engaged in commerce within the meaning of the Act. The following decisions of the Supreme Court were cited as authority: *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1; *Labor Board* v. *Fainblatt*, 306 U. S. 601, 604, 605; [fol. 204] *Wickard* v. *Filburn*, 317 U. S. 111; *Polish Alliance* v. *Labor Board*, 322 U. S. 643, 648.

We think the Labor Board correctly decided the point. Indeed, the opinion of this court in *National Labor Relations Board* v. *J. L. Hudson Co.*, 135 F. (2d) 380 (C. A. 6), certiorari denied 320 U. S. 740, though not cited by the Board either in its opinion or in its brief filed with us, justifies its ruling. The Court of Appeals for the Eighth Circuit has approvingly cited our opinion in two cases. *J. L. Brandeis & Sons* v. *National Labor Relations Board*, 146 F. (2d) 977, 979, 981; and *National Labor Relations Board* v. *May Department Stores Co.*, 146 F. (2d) 66, 68, affirmed, with modification not pertinent here, 326 U. S. 376.

In the *J. L. Hudson Company* case, we held that where more than eighty percent of the total value of merchandise

purchased by a very large retail store was shipped in interstate commerce and one and six-tenths percent of its total sales were shipped to customers in interstate commerce, the retail store was subject to the jurisdiction of the National Labor Relations Board, contrary to the same contention made here that the retailer's activities did not affect interstate commerce. The fact that, in the instant controversy, the operations of the Watson store were much smaller in scope than were those of the J. L. Hudson Company in Detroit does not differentiate the case, for the record here shows that approximately eight percent of Watson's sale-and-installation jobs were outside the State of Tennessee, and its purchases of goods from outside that state amounted to approximately thirty-three percent of its total purchases.

We deem it unnecessary to repeat the discussion pertaining to the interstate commerce feature in which we indulged in the *J. L. Hudson Company* case, where we analyzed the opinions of the Supreme Court in the *Jones & Laughlin, Fainblatt,* and *Filburn* cases cited by the Board in its opinion, discussed other opinions of the Supreme Court and cited decisions from numerous circuit courts of appeals. It should suffice to restate one of our paragraphs: "The Supreme Court, since promul- [fol. 205] gation of its opinion in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352, has adhered to the doctrine that activities, intrastate in character when separately considered, if so closely and substantially related to interstate commerce that their control is essentinl or appropriate for the protection of interstate commerce from burden or obstruction, fall within the ambit of control by Congress." 135 F. (2d) 382. The sweeping concept of the regulatory power of Congress in the constantly expanding scope of the interstate commerce clause, as construed by the Supreme Court in recent decisions, we emphasized by citation, not only of the cases previously mentioned, but also of *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119, and *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517. To this list should now be added an extremely strong example, *Martino* v. *Michigan Window Cleaning Co.*, 327 U. S. 173, reversing the decision of this court reported in

145 F. (2d) 163. See also *Mandeville Farms* v. *Sugar Co.*, 334 U. S. 219.

In a case not distinguishable in principle from the case at bar and bearing analogy in fact, the Court of Appeals for the Tenth Circuit has held that a secondary boycott against a contractor engaged solely in intrastate activities to compel it to cease doing business with a manufacturer engaged primarily in interstate business constituted an unfair labor practice under section 8(b)(4)(A) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947. *United Brotherhood of Carpenters, etc.* v. *Sperry*, 170 F. (2d) 863, 868.

It would seem that respondents treat this controversy as if it were merely one between Stanley and union workers concerning wages, and ignore the Board's finding of fact based upon substantial evidence that the purpose of the ordered walk-out was to force Stanley to cease doing business with Watson's and thus conduct an illegal secondary boycott against a concern a part of whose business was interstate commerce. In both cases emphasized by respond-
[fol. 206] ents, the orders of the National Labor Relations Board were enforced, it being found that the operations of the respective electric utility companies engaged in distributing power wholly within a state so affected interstate commerce as to fall within the ambit of the National Labor Relations Act. *Consolidated Edison Co.* v. *National Labor Relations Board*, 95 F. (2d) 390 (C. A. 2); *Southern Colorado Power Co.* v. *National Labor Relations Board*, 111 F. (2d) 539 (C. A. 10).

The respondents contend that their decision taken during working hours on August 21 to discontinue work at Stanley's residence in accordance with the working rules and practices of the union was a concerted decision not to return to work the next day, and that therefore, inasmuch as section 8(b)(4)(A) did not become effective until the following day (August 22), the section has no application and the Board lacked jurisdiction to enter the order which it did. Much reliance is placed upon the decision of United States District Judge Darr, who, in denying a temporary injunction sought by a regional director of the National Labor Relations Board to restrain the respondent union from maintaining a secondary boycott against the Ira A.

Watson Company, said that in his judgment "the whole employment relationship ceased to exist on August 21, 1947, and that when the Act became effective there was no unlawful situation"; and that "the whole incident was closed". It should be noted, however, that the judge commented that he had reached the conclusion that he "should not direct the issuance of an injunction *pending the action of the Board.*" [Italics supplied.] *Styles* v. *Local 74, United Brotherhood of Carpenters & Joiners of America, A. F. of L., et al.*, 74 F. Supp. 499, 501, 502. He properly recognized that his decision was not binding upon the Labor Board, which is vested with ultimate jurisdiction to determine the merits of a labor controversy of the instant character.

The Board found: "There is no substantial evidence that, when the carpenters ceased work on August 21, [fol. 207] they intended permanently to abandon their employment at the Stanley residence; on the contrary, we are convinced that under orders from the Respondents, the carpenters merely intended to withhold their services until such time as the Respondents' demand was met." That the carpenters were not quitting the job permanently when they took away their tools on August 21 is evidenced by Stanley's testimony, heretofore quoted, that the respondent business agent Henderson told him that the men would return to work if Stanley would cancel his contract with Watson. Moreover, it must not be forgotten that two of the carpenters returned surreptitiously to complete the job, despite the order of respondents.

Inasmuch as the strike was a continuing one, the Labor Management Relations Act of 1947 is being given no retroactive effect when held applicable to the case at bar. In *Jeffery-deWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. A. 4), certiorari denied, 302 U. S. 731, it was held that the mere fact that a labor dispute began before the enactment of the National Labor Relations Act does not have the effect of withdrawing either the parties or the dispute from the regulatory power of Congress as to subsequently occurring acts. As early as 1897, the Supreme Court applied the same principle in holding that an agreement to establish and maintain future rates for transportation, though lawful when made, constituted

a violation of the Sherman Anti-Trust Act when continued in operation after certain provisions of the agreement became unlawful in consequence of the Sherman Act. *United States* v. *Freight Association*, 166 U. S. 290.

The Labor Board based its finding that respondents were violating section 8(b)(4)(A), not upon their actions before the effective date of the Taft-Hartley Act, but in their keeping the strike order in effect after that amendatory Act of Congress became operative. As has been indicated in the foregoing discussion, we think this interpretation was correct.

Respondents urge that it would be violative of their union working rules not to work with non-union men [fol. 206] had they permitted their men to return to the Stanley job on August 22, or thereafter; that lawful observance of their working rule "once begun, could not be outlawed and the opposite rendered compulsory by subsequently effective legislation"; and that "such legislative coercion would violate the First, Fifth, Tenth and Thirteenth Amendments to the Constitution of the United States." It is true, as contended by respondents, that a union man has a constitutional right not to work with non-union men, and that "the right to sell or not to sell one's labor or services is not only a right of liberty but a right of property", protected by constitutional guarantees. But this principle is beside the point. We are not here concerned with the right of an individual worker. The order of the Labor Board directs the respondent union and its business agent, and not the union members themselves, to cease and desist from engaging in or inducing the members of Local 74 to engage in a strike or a concerted refusal, in the course of their employment, to perform services where an object thereof is to require an employer or other person to cease doing business with a specified company.

It has been held by the federal courts that an order which does not forbid the members of a labor union to stop working at will but which merely prohibits the calling of a strike by the union of which they are members does not violate any constitutional provision against involuntary servitude. See *Auto. Workers* v. *Wis. Board*, 336 U. S. 245, 251, et seq., where the Supreme Court pointed out that neither the Wisconsin statute nor the order of the Employ-

ment Relations Board of that state undertook to prohibit or restrict any employee from leaving the service of the employer, either for reason or without reason, either with or without notice, and made it no crime to abandon work individually or collectively; and, such being true, the contention that any action of the state had the purpose or effect of imposing any form of involuntary servitude was not well founded. The Supreme Court upheld the order of the state labor board directing the labor union and its [fol. 209] members to cease and desist from instigating unlawful work stoppages in the plants of an employer engaged in interstate commerce. It was held further that the Wisconsin statute did not violate the Fourteenth Amendment. Compare *Lincoln Union* v. *Northwestern Co.*, 335 U. S. 525; *Printing Specialties and Paper Converters Union* v. *LeBaron*, 171 F. (2d) 331 (C. A. 9).

An applicable authority in the instant situation is the recent opinion of the Court of Appeals, for the Second Circuit in *National Labor Relations Board* v. *Wine, Liquor & Distillery Workers Union, etc., A. F. of L.*, —— F. (2d) ——, decided December 12, 1949, where the Labor Board had found upon sufficient evidence that an object of a work stoppage was to exert pressure, by a secondary boycott forbidden by section 8(b)(4)(A) of the Taft-Hartley Act. The court enforced an order of the Labor Board directing the union to cease and desist from inducing its members to engage in a strike or concerted refusal to perform services for any employer where an object thereof is to require the employer or any other person to cease doing business with another. The Court of Appeals rejected the contention of the union that section 8(b)(4)(A), if applicable, would be in violation of the First, Fifth or Thirteenth Amendments to the Constitution of the United States. The court pointed out, and we agree, that the unanimous opinion of the Supreme Court in the *Giboney* case [*Giboney et al.* v. *Empire Storage & Ice Co.*, 336 U. S. 490] seems to make it plain that section 8(b)(4)(A) of the Taft-Hartley Act cannot be regarded as invalid under the First Amendment to the Constitution. Likewise, the contention that the section violates the Thirteenth and Fifth Amendments was appropriately rejected; and reference was made to the same relevant cases heretofore cited or discussed.

Respondents argue that the case is moot, for the rea-

son that the entire work on Stanley's residence has been completed. It is insisted that the Board could not reasonably anticipate future violations and that its cease and desist order is, therefore, not justifiable. We have heretofore held such argument to be unsound. In Na- [fol. 210] *tional Labor Relations Board* v. *Cleveland-Cliffs Iron Co.*, 133 F. (2d) 295, 300, this court said: "It has long been the rule that mere discontinuance of an unlawful practice will not relieve the court (or an administrative agency) of the duty to pass upon a pending charge of illegality, when by the mere violation of the parties the illegal practice may be resumed. *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 S. Ct. 540, 41 L. Ed. 1007; *Southern Pac. Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 31 S. Ct. 279, 55 L. Ed. 310; *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 58 S. Ct. 863, 82 L. Ed. 1326. The order is a continuing one and may be enforced if it is disobeyed." In *National Labor Relations Board* v. *Toledo Desk & Fixture Co.*, 158 F. (2d) 426 (C. A. 6), we again held that abandonment of an illegal practice does not cause the controversy to become moot, and decreed an enforcement of an order of the National Labor Relations Board. In *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271, the Supreme Court declared that an order of the Labor Board lawful when made "does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made."

We find no merit in the contention of the respondents that the Board's order should not be enforced because of the *de minimis* doctrine. The probable effect of the secondary boycott against Watson's, unlawfully ordered and conducted by the respondents, is not, upon this record, a matter of inconsequential importance.

The order of the National Labor Relations Board will be enforced as prayed in its petition.

[fol. 211] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 212] SUPREME COURT OF THE UNITED STATES

No. 85, October Term, 1950

Order allowing certiorari—Filed December 11, 1950.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 54, 585 U. S. Court of Appeals, Sixth Circuit, Term No. 85, Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., et al., Petitioners, vs. National Labor Relations Board. Petition for a writ of certiorari and exhibit thereto. Filed May 22, 1950. Term No. 85 O.T. 1950.

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IN THE

Supreme Court of the United States

October Term, [redacted] 1950

No. [redacted] 85

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. of L., and JACK HENDERSON, Individually and as Agent for Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L.,
Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION AND BRIEF OF LOCAL 74 AND JACK HENDERSON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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After having expressly requested and stipulated for a local union job (R. 100), Stanley later injected into the work while in progress non-union men to take over part of the employment of the union men which, admittedly, they were performing satisfactorily (R. 107).

Section 8(b)(4)(A) was never intended to be wielded by an owner as a sword for the subversion of union employment which he himself had created 34

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IN THE

Supreme Court of the United States

October Term, 1949

No.

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. of L., and JACK HENDERSON, Individually and as Agent for Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L.,
Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION OF LOCAL 74 AND JACK HENDERSON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and Jack Henderson, Individually and as Agent for Local 74, respectfully shows:

The Petitioners seek review of a decree by the United States Court of Appeals for the Sixth Circuit, filed April 4, 1950, granting a petition for enforcement filed by the Respondent, National Labor Relations Board (R. 199).

The Court's opinion is not yet reported, but is printed in the Record on pages 200-210.

The Proceeding

The Petitioners were charged by the General Counsel's complaint with unfair labor practices affecting commerce within the meaning of Section 8(b), subsections (1) (A) and (4) (A), and Section 2, subsections (6) and (7) of the Labor-Management Relations Act, 1947, herein called "the Act" (R. 165, 169).

The Petitioners filed an "Answer and Motion" wherein they denied the charge and moved to dismiss the complaint (R. 170).

The grounds of the Motion to dismiss were enumerated in the Answer and in Exhibit B thereto annexed (R. 174), which Exhibit was the Answer and Motion of the Petitioners to an application simultaneously filed by the General Counsel in the District Court of the United States for the Southern Division, Eastern District of Tennessee, asking for a preliminary injunction pursuant to Section 10(1) of the Act (R. 174-181, 182-8).

Included in those grounds were these Petitioners' constitutional claims under the First, Fifth, Tenth and Thirteenth Amendments (R. 33, 45, 46, 48, 180).

This petition was denied by United States District Judge Darr with an extended opinion reported in *Styles* v. *Local 74 et al.*, 74 F. Supp. 499 (Oct. 28, 1947). Judge Darr's opinion concluded as follows (p. 502):

> "In fact, my judgment is that the whole employment relationship ceased to exist on August 21, 1947, and that when the Act became effective there was no unlawful situation. The whole incident was closed.
> • • •
>
> In any event, my judgment is that the factual situation upon which the application is based sets up lawful conduct and therefore there can be no inference that this would indicate a future action of unlawful conduct.

Being of the opinion as herein set out, I have concluded that this is not a case under the Act and that I should not direct the issuance of an injunction pending the action of the Board."

The General Counsel took no appeal from this denial.

The Examiner's Report

The Trial Examiner's Report, dated December 29, 1947, held that there had been a violation by Petitioners of Section 8(b)(4)(A), but not of Section 8(b)(1)(A); and that, as an administrative officer, he could not pass upon the constitutional issues (R. 12, 33).

His chief recommendation was that the Petitioners (R. 36):

> "1. Cease and desist from engaging in or inducing the members of Local 74 to engage in a strike or a concerted refusal in the course of their employment to perform services for any employer, where an object thereof is to require any employer, or other person to cease doing business with Ira A. Watson Company, doing business as Watson's Specialty Store, or other person."

The Petitioners filed full exceptions (R. 39), including exceptions on the constitutional grounds (R. 45, 46, 47-50).

The Board's Decision

In its order of November 22, 1948 (80 N. L. R. B. 533) the Board confirmed these recommendations and adopted the Examiner's findings and conclusions with certain "additions and modifications" (R. 61).

Among such modifications were the following (R. 57, footnote 10):

"The Trial Examiner erroneously stated that the Respondents (Petitioners herein) did not dispute that the strike order in question would have been illegal if issued after August 22, 1947."

Also (R. 56, footnote 9):

"We agree with the Respondents (Petitioners herein) that it is immaterial for purposes of this decision whether the carpenters were employees of Stanley or of Parker, who had contracted with Stanley to do certain work on the latter's residence, as set forth in the Intermediate Report."

Also (R. 60, footnote):

"Under the circumstances here present, we deem it immaterial whether the strike actually began on the afternoon of August 21 or on the following morning. Consequently, we do not rely on or adopt the Trial Examiner's finding that the strike did not actually begin until the morning of August 22."

In a concurring opinion the Chairman expressed the belief that the Board must assert jurisdiction since the General Counsel had "seen fit to prosecute", notwithstanding that *the controversy was "so local and so diminutive"* (R. 62).

In dissenting, the Hon. John M. Houston, a member of the Board, said (R. 63):

"I believe that the effect on commerce here is so remote and so insubstantial and that the controversy involved is so local in character as to make undesirable any exercise of the Federal power. I see no compulsive consideration in the legislative history of the amended statute which would indicate the contrary merely because the operation involved concerns the building and construction industry."

Summary and Short Statement of Matter Involved

This petition and the decision of the Court of Appeals involve the construction and application of Section 8(b)(4)(A) of the Labor-Management Relations Act, 1947, hereinafter called "the Act".

This statutory provision, as quoted in the opinion of the Court of Appeals, reads (R. 200):

> "'Sect. 8 * * * (b) It shall be an unfair labor practice for a labor organization or its agents— * * * (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person: * * *" [158(b)(4)(A), Title 29, U. S. C. A.]."

In its opinion the court below decided:

1. These Petitioners violated this statute by participating in and inducing a strike at the residence of George D. Stanley near Chattanooga, Tennessee, with an objective of forcing him to cease doing business with Ira A. Watson Company, operating in Chattanooga under the trade name "Watson's Specialty Store", which was found to be purchasing some of its local stock from sources outside of Tennessee (R. 200-1).

2. These Petitioners were wrong in their contention that the Board was without jurisdiction because interstate commerce was not involved and because such commerce was not the subject of the withdrawal of the union men from Stanley's residence (R. 203-4).

3. These Petitioners were wrong in their contention that, because the decision to discontinue work at Stanley's residence was taken on August 21, 1947, the day before the Act took effect, the statute had no application and the Board lacked jurisdiction (R. 206-7).

4. These Petitioners were wrong in their contention that, since there were findings that it would have been a violation of the rules of the union for the carpenters to return to the Stanley job on August 22nd or thereafter and that the concerted refusal to work with non-union workers was in accordance with the union rules and long established labor precedents, there was no violation of the Act (R. 207).

5. These Petitioners were wrong in their contention that, if the Act be interpreted as the court below interpreted it, such legislative coercion would violate the First, Fifth, Tenth and Thirteenth Amendments to the Constitution of the United States (R. 208).

6. These Petitioners were wrong in their contention that they violated no law by complying with the traditional union practice and this Union's Rule not to permit non-union men to take over part of the agreed union employment, or by participating in a withdrawal which was expressly found by the Examiner and the Board to have been "simply a concerted refusal to continue working with non-union workers, in accordance with long established labor precedent" (R. 208-9, 27, 53, 60).

7. These Petitioners were wrong in their contentions that, because the entire work at Stanley's residence was wholly completed within a few days thereafter, the case was moot as matter of law, and there was no justification in law for a cease and desist order (R. 209, 210).

8. These Petitioners were wrong in their contention that, as matter of law, the Board's order should not be enforced because of the *de minimis* principle (R. 210).

The Petitioners respectfully challenge these rulings by the court below.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, Section 1254 of the United States Code.

The Statutes Involved

The statutes involved are Section 8(b)(4)(A) of the Labor-Management Relations Act, 1947, and Sections 2(6) and (7).

These statutes are set forth in the annexed Appendix.

The Constitutional Amendments involved are the First, Fifth, Tenth and Thirteenth.

Brief Statement of the Facts

The Trade Jurisdiction of the United Brotherhood and of Local 74

The Examiner found and the Board confirmed that the United Brotherhood and Local 74 had, within its trade jurisdiction, the crafts of carpentry and laying of coverings for floors and walls; that Local 74 had, among its members, craftsmen competent to perform work similar to that of Watson's installation employees; that the Working Rules of the Local had long provided that no member "shall be permitted to work on any job" "with a non-union carpenter" for more than one day (R. 16, 20, footnote 15; Exhibits 2 and 3, Section 7, p. 4; and R. 9); and that (R. 21):

> "Business Agent Henderson testified credibly that it was and had been for many years the practice of Local 74 not to permit their union members to work on a job where non-union workers were employed; that, in this instance, Local 74 ordered the work stoppage of its members when it learned that non-union employees of Watson's were also working on the Stanley residence; and that it would have been a violation of the rules of the Union for the carpenters to have returned to that particular job on August 22 or thereafter."

Stanley's Contract for a Union Job at his Residence

On July 31, 1947, George D. Stanley purchased a house near Chattanooga for occupancy as a private home for himself and his family exclusively (R. 91, 102). On August 4, 1947, he made a written contract with B. F. Parker (an independent union contractor and himself a member of the Petitioner, Local 74) to improve portions of the in-

terior in ways including the installation of floor and wall coverings (R. 18, 19, footnote 13; 198). Stanley testified (R. 100):

> "I wanted Union men and had always enjoyed having Union men working, preferred them because I thought their work was better, and that Parker—*it was my understanding with Parker that Union men were going to do the work.*"

Stanley's contract with Parker was the usual cost-plus contract (R. 196), Parker having the sole right "to hire and fire" (R. 105, 143-4).

In accordance with Stanley's foregoing request Parker employed, for the renovation work in Stanley's residence, *solely union men* (R. 19; and footnote 13). Under the terms of their employment, Parker's employees could quit *at will* (R. 144, 162-3).

The court below has correctly stated (R. 202):

> "All workmen hired by Parker were union members, including carpenters who were members of Local 74."

The work in Stanley's residence thereupon started promptly. Stanley expressly admitted that the union "were doing their work satisfactory" (R. 107).

Stanley's Subsequent Contract with Watson's

While Parker and his union men were thus engaged in the satisfactory fulfillment of this contract, Stanley decided to have a floor and wall covering then in stock at the Watson's Store which employed only non-union men (R. 17, 81, 89-90, 93-4, 103, 107, 109, 140-1). Watson's was a specialty store which secured some of its local stock from suppliers in other states (R. 16).

Because of Watson's employment of non-union men, Local 74 was then peacefully maintaining a single picket in front of the store (R. 17, 18). The picket was withdrawn on or before August 28, 1947 (R. 17, 18, footnote 11). The Examiner has reported that there is no evidence that Watson's lost business because of this picket (R. 23, footnote (24). Both the Examiner and the Board held that this brief, peaceful picketing was entirely lawful (R. 22-26, 60).

Stanley has repeatedly admitted that he knew, and was warned by Parker, that if, in the installation of the floor and wall coverings in his residence, he took the work of installation away from the union men and gave it to Watson's non-union men, the union men would quit the job (R. 95, 103, 109, 145-6, 148).

Stanley, therefore, as was admitted by Watson's store manager, had first tried to buy the material from Watson's *separately*, in order that it could be installed by Parker's union men (R. 89).

Watson's, however, saw an opportunity to strike at the Local; and (as found by the Examiner and confirmed by the Board and the court below (R. 19, 53, 60, 202), Watson's refused to sell the coverings to Stanley at all *unless they were installed by its own non-union employees.* Thereupon Stanley made a written contract with Watson's dated August 15, 1947, whereby, for a lump sum, Watson's was to *both "furnish and install"* (R. 93, 195). Thus, this contract was double barreled,—and designed by Watson's to be so. Both barrels were pointed directly at Local 74.

Stanley has admitted that he was well aware that this act on his part would be deemed an act of provocation against the union men and the Union's Working Rule and its crafts jurisdiction (R. 95). Nevertheless, he told both Parker and Watson's manager (R. 145): "To hell with the Union. I'll do as I please".

Watson's Non-Union Men Take the Installation Work Away from the Union's Members

Watson's thereupon adopted the strategy of getting its employees surreptitiously into physical possession of the installation work at Stanley's residence by the stratagem thus stated by the Examiner (R. 19, 93-4, 185, 202):

> "The installation work (by Watson), estimated to take a week, was started on *Sunday*, August 17, when there were no other workmen present." (Italics ours.)

On Monday and Tuesday, August 18 and 19, Watson's provocatively challenged the Union and its members by taking over the installation work "during the regular working hours" (Examiner, R. 19). On Wednesday, August 20, two of the union carpenters stopped work for half an hour because of the presence of non-union men (Examiner, R. 19, 20).

The Union's Members Quit the Stanley Job on August 21

On August 21 the situation at Stanley residence was as follows (Examiner, R. 57; footnote 11):

> "There were but two groups of employees then on the job: the carpenters and Watson's installation employees."

About three o'clock in the afternoon of August 21 Henderson came to the Stanley residence and told both Parker and Stanley that the union men were packing up and leaving because the non-union men were taking over the installation work (R. 20, 99-100, 103, 106-7).

Stanley testified that the union men thereupon did "pack up and leave" (R. 100-1, 104). The court below has correctly stated that "they did not return" (R. 202-3); and the Examiner has found, and the Board has confirmed (R. 21; footnote 20):

"Business Agent Henderson testified credibly that * * * it would have been a violation of the rules of the Union for the carpenters to have returned to that particular job on August 22 or thereafter. * * *

Henderson's testimony is also credited that in his capacity as business agent for the Union he was not asked at any time after August 21 by either Stanley or Parker to order the union carpenters to return to the Stanley job."

Both Parker and Henderson testified without contradiction or challenge that the union men were entirely willing to install Watson's coverings, and that on other jobs they had installed "material furnished by Watson" (R. 138, 146).

Stanley testified that, when he asked Henderson how he could get the union men back, Henderson suggested that he cancel his contract with Watson's (R. 57, 203). The Board accepted Stanley's testimony (R. 57), notwithstanding that Henderson, Parker and others denied it (R. 157-8, 141-2, 161, 163).

Obviously, even if Henderson made this statement, it would merely express the consequence of *the installation clause* in Stanley's contract with Watson's.

Completion at Stanley's Residence in About a Week

To quote the Examiner (R. 21):

"On August 22nd Parker telephoned Watson's that the installation work could be resumed. Two or three days later Watson's men returned to the job and completed their work about August 28. In fact all the renovating of the Stanley house was completed on or about the end of August, the unfinished carpentry being completed by two of the four union men who had been on the job (at the urgent request of Parker), but without the knowledge or consent of the Respondents" (Petitioners herein).

There is neither claim nor evidence that the Petitioners ever picketed the Stanley residence, or threatened to do so, or solicited any of Watson's employees at that job not to work there.

Questions Involved

1. Did the Board have jurisdiction? Was not the brief construction job in Stanley's private residence so essentially local, separate and transitory as not to fall within interstate commerce in the constitutional sense?

2. Does the Labor-Management Relations Act, 1947, apply to labor disputes in a construction operation as essentially local, separate and transitory as was this job in Stanley's private residence?

3. Does that Act apply to a local labor dispute which involved not interstate commerce but (as the finding is, R. 27, 53, 60) "simply a concerted refusal to continue working with non-union men, in accordance with long established union precedent", and, we add, with the commonest of all union trade rules.

Stanley, having expressly requested and stipulated for a union job (R. 100), later injected into the work while in progress non-union men to take over part of the employment of the union men.

Can an owner use Section 8(b)(4)(A) *as a sword* when he decides to turn over to non-union men work on which union men were employed?

4. In a case where the local owner had contracted for union men to be employed at will, does Section 8(b)(4)(A) require the union and its members to continue working after the local owner has injected non-union men to take over some of the very work which the union men had been employed to do and were performing satisfactorily?

5. If Section 8(b)(4)(A) is interpreted as including and imposing such a requirement, is it a violation of the Federal Constitution, First, Fifth, Tenth and Thirteenth Amendments?

6. Since Section 8(b)(4)(A) was not in effect on August 21, 1947, when the decision to discontinue work at Stanley's residence in accordance with the Working Rules and practice of the Union and of the United Brotherhood was made, concerted and put in effect, were the Petitioners guilty of an unfair labor practice, after the Section took effect, in not rescinding and in not directing the union men to return to work?

7. If Section 8(b)(4)(A) be so interpreted and applied as to have required the Petitioners on August 22 to "rescind" the so-called "order" lawfully made on August 21 and thus direct the union men to return to work under the non-union condition interjected by Stanley, would such interpretation and application violate constitutional principles?

8. Assuming (contrary to the fact) a violation by the Petitioners at Stanley's residence, was "a cease and desist order" justified in law? And did not the case fall, as matter of law, within the *de minimis* principle?

Reasons Relied on for the Allowance of the Writ

1. The issue of law as to whether a brief construction job in a private residence or like building is so essentially local, separate and transitory as not to fall within the Interstate Commerce Clause and the jurisdiction of the National Labor Relations Board, has never been decided by this Court, and yet is of such common and important application and of such profound concern to our Federal system, the building industry, building trades unions, and the general public that the determinations below should be reviewed by this Court.

As shown under Point I of the annexed Brief, this question is the subject of much current debate, confusion and contradiction. Senator Taft has denied the applicability of the Taft-Hartley Act. Notable decisions by this Court and other courts have held the Interstate Commerce Clause inapplicable. The decision of the National Labor Relations Board in this very case was not unanimous, and has been followed by other decisions of the same Board with an altogether different outlook. Committees of both Houses of Congress have denied, and are denying, that the Taft-Hartley Act was intended to encompass such construction, and have denounced the interpretation and application by the General Counsel as breaking down the federal system and putting the whole economy of the nation under the federal power and the Taft-Hartley Act.

2. The issue of law as to whether an owner who has set up a 100% union job, can wield Section 8(b)(4)(A) *as a sword* when he later wishes to transfer a part of the union employment to non-union men, is of vital consequence to the interpretation and application of the Taft-Hartley Act, to the building industry, to the building trades unions, and to the general public.

Involved in this issue are profound constitutional principles affecting liberty, property and the freedoms of livelihood and collective bargaining. On this issue this Court has never passed, so far as we can discover.

3. The issue of law as to whether where, just before Section 8 of the Taft-Hartley Act took effect, a Union has lawfully withdrawn its members because the owner has converted a job from wholly union to partly non-union, the withdrawal must be rescinded as soon as Section 8 took effect notwithstanding that the owner continued with his injection of non-union men, is likewise a question of great importance to the same large groups and to the general public; and likewise involves profound constitutional principles.

4. The true limits in law of the power to impose "a cease and desist order", notwithstanding that the job was soon completed and there was no proof of any like circumstances or any like action taken or intended, also present questions of major general importance in the nation-wide field of labor relations.

Is it still the law that "a cease and desist order" cannot be issued on speculation or conjecture, or as a reproof, exhortation or penalty?

5. The Chairman of the National Labor Relations Board accurately described the event in Stanley's residence as *"so local and so diminutive a controversy"* (R. 60). It is the perfect example of a tempest in a tea cup.

Is the *de minimis* principle a mere matter of variable discretion and fancy? Or does it contain a principle which can, as a matter of law, rule out mere trifles?

Obviously, these questions deeply concern the efficiency, dignity and cost of government, and the extent of its lawful busybodiness in the "diminutive" doings of its citizens.

Dated, May 19, 1950.

Respectfully submitted,

Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., and Jack Henderson, individually and as the business agent of Local 74,

Petitioners,

By CHARLES H. TUTTLE,
FRANCIS X. WARD,
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BRIEF

POINT I

The court below erred in holding that the Board had jurisdiction.

The brief construction job in Stanley's private residence was so essentially local, separate and transitory as not to fall within the interstate commerce clause, and hence not within the Labor-Management Relations Act, 1947.

The predicates implicit in the General Counsel's argument and the decision below, as applied to the facts of this case, would endanger our federal system and trade unionism, would wipe out the distinction between interstate and intrastate commerce, and would bring the entire building industry, however local the construction, under federal control and under the Taft-Hartley Act.

Not only was the Stanley matter purely local, but it all took place and was over, and all the improvements in his house were completed, within a week (R. 17-8, 21, 58).

It was as transient as it was local, and fully justifies our respectful opinion *that if ever there was a tempest blown up in a local teacup, this proceeding is it.*

Senator Taft

There are many authoritative voices that the Act has, and can have, no general application to a local construction job or to a local building union performing a local job. *A fortiori*, it can have no application to the installing of imitation tile in Stanley's home in Chattanooga.

In the New York Journal-American of July 7, 1947, *Senator Taft*, in a signed statement under the heading "Sen. Taft Explains New Labor Act," made the following answer to the following question:

> "52—Q. Will this prevent jurisdictional strikes in the construction industry?
>
> "A. The construction industry ordinarily would be intrastate commerce and would not be affected by the Act. Of course, there are instances where it is interstate commerce, and in such cases the employer can obtain a decision from the National Labor Relations Board settling the jurisdictional dispute."

In *Colliers Magazine* for March 6, 1948 (Volume 121, No. 10) *Senator Taft* reported on the first few months of the Act's operation. In an article entitled, "Toward Peace in Labor", he said at page 39:

> "I might say, however, that I don't think Congress intended that this provision (closed shop) extend to local building-trade unions whose work is, in fact, *intrastate* in character. The status of such unions ought to be left to the State Law." (Parenthesis and italics ours.)

Decisions by This Court

Levering & Garrigues Co. v. *Morrin*, 289 U. S. 103, 107, is a conclusive authority *a fortiori*. It involved a suit to enjoin the defendant union and employer association from compelling or conspiring to compel the petitioners to employ in their work of fabricating and erecting structural steel and iron only members of the labor union. The Supreme Court, in dismissing the complaint, said (p. 107):

> "Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy

was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce, *Use of the materials was purely a local matter*, and the suppression thereof the result of the pursuit of a purely local aim." (Italics ours.)

The opinion in this *Levering* case cited as authority the case of *Industrial Assn.* v. *United States*, 268 U. S. 64. That case involved a combination on the part of building contractors and others, to establish the open shop plan of employing labor, by requiring builders who desired materials of certain kinds to obtain permits from a builders exchange, and by refusing such permits to those who did not support the plan. The Court, in holding that any resultant interference with the free movement of materials from other states was incidental, indirect and remote and hence was not an unlawful interference with interstate commerce, said (p. 82):

> "The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation—*for building is as essentially local* as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act." (Italics ours.)

In *Anderson* v. *Shipowners Assn.*, 272 U. S. 361, the Court, in holding that the facts showed that the alleged combination was in violation of the Sherman Act, nevertheless stated in relation to local business (p. 363):

"*Nor is building commerce;* and the fact that the materials to be used are shipped in from other states does not make building a part of such interstate commerce." (Italics ours.)

Decisions by Other Courts

There are many decisions to the same effect.

Mere local construction, original and transitory, such as was occurring within Stanley's private residence has always been judicially regarded as an intrastate activity. Otherwise, and if laying a little wall and flooring covering in several rooms in a single home can be drawn within the federal orbit, it is scarcely possible to conceive of any local business which would be exempt from the jurisdiction of the National Labor Relations Board.

The mere fact that some of the materials bought for the purpose of such a job may have been purchased from a local stock which in turn had been built up partly from a source in another state, does not confer jurisdiction on the National Labor Relations Board or other federal agency deriving its authority from the interstate commerce clause.

McDaniel v. *Brown & Roat, Inc.*, 172 F. 2d 466, 471 (C. C. A. 10);

Kelly v. *Ford, Bacon & Davis*, 162 F. 2d 555, 561 (C. C. A. 3);

Mills v. *United Ass'n of Journeymen*, 83 F. Supp. 240, 246;

Barbe v. *Cummins Construction Co.*, 49 F. Supp. 168, 171;

Scott v. *Ford, Bacon & Davis*, 55 F. Supp. 982, 984.

In addition to the above, there are many cases holding that local conduct will be insulated from the operation of the Sherman Act and other federal laws as to interstate commerce on the basis of the purely local aims and actions.

Albrecht v. *Kinsella*, 119 F. 2d 1003, 1005;
United Leathers v. *Herkert*, 265 U. S. 457;
United Mine Workers v. *Coronado*, 259 U. S. 344;
Pedersen v. *D. L. & W. R. R. Co.*, 229 U. S. 146;
Raymond v. *Chic., Milw. & St. Paul R'way Co.*, 243 U. S. 43;
Oregon Short Line R. Co. v. *Gubler*, 9 F. 2d, 494.

Thus, in the *Raymond* case, *supra*, it was held that the plaintiff, who was injured while laboring in the construction of a new tunnel for his employer (a railroad actually operating as an interstate carrier) was not engaged in interstate commerce and that the railroad was also, as regards the construction of the tunnel, not engaged in interstate commerce.

The Line between Interstate and Intrastate Commerce

It is inconceivable that Congress intended to attempt to wipe out the constitutional distinctions between intrastate and interstate commerce, or to extend the federal control over local activities having only a speculative, indirect, incidental or collateral effect on interstate commerce.

All intrastate commerce can theoretically have some remote consequence as regards interstate commerce. Nevertheless, the courts have been alert to hold that our constitutional system of delegated powers requires that the federal power can extend to local transactions only when their effect on interstate commerce is direct and immediate.

In *Schechter Corp.* v. *U. S.*, 295 U. S. 495, the Court said (p. 546):

"But where the effect of intrastate transactions upon interstate commerce is merely indirect, such

transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control."

The reasoning in the *Schechter* opinion was followed by the Supreme Court in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, where the Court said (p. 309):

"The federal regulatory power ceases when interstate commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins. There is no basis in law or reason for applying different rules to the two situations. * * * A reading of the entire opinion (in the *Schechter* case) makes clear, what we now declare, that the want of power on the part of the federal government is the same whether the wages, hours of service, and working conditions, and the bargaining about them, are related to production before interstate commerce has begun, or to sale and distribution after it has ended."

The same principle is stated in *Kidd* v. *Pearson*, 128 U. S. 1, 20, and in the qualifying language in *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, at page 37.

The Decision Quoted by the Court Below

The only decision from which, on this issue of law, the court below quotes (R. 204-5) is *National Labor Relations Board* v. *J. L. Hudson Co.*, 135 F. 2d 380 (C. C. A. 6), certiorari denied 320 U. S. 740.

There, we submit, the facts and the situation and relationship of the parties bear no relation to the present instance. In that case, the party accused by the Board of unfair labor practice was the employer and was engaged directly and immediately in interstate commerce both as a purchaser and a seller. It was "an enormous retail department store in Detroit, Michigan" which annually purchased $35,000,000 worth of salable merchandise from points outside of Michigan and sold and shipped merchandise to the extent of about $1,400,000 to customers outside the State of Michigan. It spent about $250,000 on advertising in states other than Michigan. It had thirty-six active trademarks registered in its name in the United States Patent Office.

The complete difference between that case and the present is obvious. In the present case, the parties charged with unfair labor practice are a small local union in Chattanooga and a single individual who resides in Chattanooga and was that Local's business agent. Neither the Local nor its business agent was engaged in any interstate commerce whatever. No such claim is even made. The work being done was purely local, and consisted exclusively of a small amount of construction work in a few rooms in Stanley's private residence. The employees engaged thereon were purely transitory and were employed at will and solely for this job. This employment, set up by Stanley himself as a 100% union job, was subsequently subverted by him when he sought to transfer the installation work being done by the union men to non-union men employed by an employer other than Parker. That purely local act of Stanley's precipitated the event.

In consequence, when, in the *Hudson* case, the Court of Appeals for the Sixth Circuit said that the Board had jurisdiction because the activities of the accused department store were "interstate commerce in such close and intimate fashion" (135 F. 2d 380, 382), it was using this language with reference to an accused which was itself a vast purchaser and seller directly through the channels of interstate commerce,— thus bearing no comparison whatever to the individual and the small local accused in the present case, engaged in no interstate commerce at all.

The General Counsel's Interpretation

Although in his brief below the General Counsel argued that, notwithstanding that the building activity here was local and in a private residence, nevertheless such activity may reach interstate commerce, if multiplied by frequent instances. For example, the General Counsel stated on page 23 of his brief below:

> "This is not to say that the impact on commerce resulting from respondents' activities on the Stanley job would in itself be substantial but the threatened effect on commerce is not measured solely in terms of that single project."

This argument, as applied to the facts of this case, is, we submit, (1) purely hypothetical and speculative, (2) highly dangerous and fallacious in its constitutional implications, and (3) repugnant to authoritative judicial decisions dealing with comparable facts. Moreover, there was no proof whatever of similar instances. The Stanley affair was unique, for it was he who, after setting up the job as a union job imposed non-union conditions.

There is not a particle of evidence that the Local ever did or ever would refuse to install Watson's materials by its own members. The uncontradicted and unchallenged

testimony was that the union men would willingly have installed it (R. 138, 146).

There is neither claim nor evidence that the Petitioners ever picketed the Stanley residence, or threatened to do so, or solicited any of Watson's employees at that job not to work there.

Furthermore, the Examiner himself has expressly found that all picketing at Watson's store, begun before the Stanley job, was discontinued by August 28, 1947 (R. 17, 18). There could be no clearer proof that even that lawful activity had promptly ceased to have any aspect or promise of continuance. There is not a particle of evidence that its resumption was contemplated or has ever occurred.

Also the Examiner has found that Watson's materials were all laid by August 28, and the entire job at Stanley's residence completed by August 31 (R. 21).

The momentary tempest in a teacup, stirred by Stanley's act in injecting non-union working conditions after setting up the job as a union job, had blown itself out.

The Courts have rejected reasoning so subverting of settled principles essential to our Federal system, as that sought to be applied by the General Counsel to the facts of this case.

Thus, in the *Schechter* case, 295 U. S. 495, the Supreme Court said (p. 554):

> "Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. *Cf. Chicago Board of Trade* v. *Olsen*, 262 U. S. 1. There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system."

In *Santa Cruz Fruit Packing Co.* v. *NLRB*, 303 U. S. 453, the Supreme Court said (p. 466):

"It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection."

The General Counsel has cited:

NLRB v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1;
Polish National Alliance v. *NLRB*, 322 U. S. 643;
Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U. S. 219;
United Brotherhood v. *Sperry*, 170 F. 2d 863 (C. C. A. 10).

The *Jones & Laughlin* case, *supra*, cited by the General Counsel, upheld the constitutionality of the National Labor Relations Act by which the Congress exercised the federal power to protect the general field of interstate commerce from disruptions through industrial strife. The opinion has, in our judgment, relevancy to the present case *only* because of the following two sentences therein (301 U. S. 1, 30, 31):

"The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."

"There can be no question that the commerce thus contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce *in the constitutional sense.*" (Italics ours.)

The *Polish National Alliance* case, *supra* (322 U. S. 643), cited by the General Counsel, can have no conceivable application. There the Polish National Alliance, which the National Labor Relations Board had found guilty of unfair labor practices, conducted a nationwide business, playing an insurance, lending, investing and credit role "in interstate industries, railroads, and other public utilities", and conducting financial transactions across state lines in such wise as inevitably to affect "to an extent not negligible the interstate enterprises in which the large assets of Alliance are invested" (pp. 645-6).

The *Mandeville Island Farms* case, *supra* (334 U. S. 219), cited by the General Counsel, was an instance where the defendant was sued for a nationwide conspiracy in violation of the Sherman Act. The Supreme Court upheld the sufficiency of the complaint which alleged both monopoly and price fixing. The Court merely held the obvious, to wit: that the monopolization of all local business, when achieved by restraining interstate commerce, is condemned by the Sherman Act (pp. 235-6).

The *United Brotherhood* case, *supra* (170 F. 2nd 863), cited by the General Counsel, was not local at all. There, in the course of a strike against an employer shipping prefabricated houses throughout the United States, a secondary strike was instituted against a purchaser of such houses in the very act of shipment across State lines.

The General Counsel also attempts to erase, or at least blur, the distinction as applied to this case between intrastate and interstate commerce, by citing statements from the Senate Report on the Taft-Hartley Act and statements made by individuals in the debates in Congress.

We think that the foregoing statements by Senator Taft, the chief author and draftsman of the Act, are an adequate answer to this attempt.

The Subsequent Cleavage between the General Counsel and the Board as to the Application of the Act to Small Local Construction

As far as we can ascertain, the present case was the first, involving local temporary construction in *a private residence,* to come before the Board. The Board accepted jurisdiction, with a reluctant concurring opinion by the Chairman and an outright dissent by member Houston.

Thereafter, in several cases, the Board refused to take jurisdiction and dismissed cases concerning *companies in the building construction industry* on the very ground that their business was primarily local and insubstantial.

These cases are:

Walter J. Mentzer, 82 N. L. R. B. No. 39;
Petredis & Fryer, 85 N. L. R. B. No. 45;
Row Construction Co., 88 N. L. R. B. No. 132;
B. W. Fellers Co., 88 N. L. R. B. No. 212.

In the *Mentzer* case (unofficially reported at 23 LRRM 1570), the facts show that the respondent was a plasterer contractor who purchased material from outside the state. The General Counsel argued that the facts in this case established the importance of the small establishment in the construction industry, and required that this type of business be brought under the Act.

The Board, however, stated that in numerous cases involving aspects of the building construction industry, they have refrained from accepting jurisdiction. In refusing to accept jurisdiction in that case, the Board stated:

> "Accepting the General Counsel's offer as proved, we nevertheless find that the operations of Respondent Mentzer, a small contractor, *are essentially local in character,* and that their interruption by a labor dispute could, at most, have only very remote and in-

substantial effect on commerce. Nor does Mentzer's status as a building contractor dictate a different conclusion." (Italics ours.)

In concurring, Chairman Herzog stated:

"This building construction operation is both local and insubstantial. Although its local attributes seem to me no more conspicuous than those present in the *Watson* case, where we exercised jurisdiction, a different result is permissible and warranted here because the section of the Act involved has a different legislative history."

In the *Petredis & Fryer* case (unofficially reported at 23 LRRM 1395), the Board declined to take jurisdiction even though there was a secondary boycott and a general local contractor who was engaged in the construction of a theatre was the charging party. The Board stated:

"On the basic jurisdictional facts * * * this case involves at the very most an impact on commerce no greater and no less remote than that present in the recent Mentzer case (*Matter of Walter J. Mentzer*, 82 NLRB #39, in which a majority of the Board declined to accept jurisdiction."

In *Row Construction Company* (unofficially reported at 25 LRRM 1362), the Board held that the intention of the National Labor Relations Act would not be effectuated by asserting jurisdiction over a complaint where the employer's operations were limited to the construction of small municipal buildings. The Board, in rejecting the arguments of the General Counsel that jurisdiction should be asserted, stated:

"The General Counsel in fact concedes that the business of Row, standing alone, is so small that the Board, should it follow certain precedents, would not exercise jurisdiction herein. (See *Petredis & Fryer*, 85 NLRB No. 45, [24 LRRM 2395], and cases cited therein). But, according to the General Counsel, there are reasons why jurisdiction should be asserted here. First, that the general contracting industry is a multi-million dollar industry, conducted primarily by small units which constitute, in the aggregate, a vast volume of interstate commerce; that nearly 50 percent of all general contracting within Southern California is performed by contractors with 3 or less employees; and that the fact that Row's 'own contribution to the demand for construction products may be small in volume is not enough to remove him from the scope of Federal regulation * * *' A similar argument was advanced before the Board in the *Mentzer* case, and disposed of adversely to the General Counsel. (*Walter J. Mentzer*, 82 NLRB 389 [23 LRRM 1570]). Second, that if jurisdiction exists in this proceeding, the Board must exercise it, that discretion does not lie within the Board to dismiss a complaint solely because it believes that to assert jurisdiction would not effectuate the policies of the Act, and that the question whether jurisdiction should be asserted in any case is for determination exclusively by the General Counsel. This proposition too has been considered by the Board, and decided adversely to the General Counsel. (*Haleston Drug Stores, Inc.*, 86 NLRB No. 125 [25 LRRM 1040]).

In *B. W. Fellers, Inc.* (unofficially reported at 25 LRRM 1473), the Board declined to assert jurisdiction in a complaint proceeding where the employer was a local general contractor engaged primarily in residential construction. This ruling was based by the Board on the *Petredis & Fryer* and *Mentzer* cases noted above.

These decisions by the Board, rendered after its decision in the present case, show that:

1. The Board has become alive to the fact that, if the Taft-Hartley Act is extended to local temporary construction in a private residence or a like building, there is no limit to the extension of that Act over the entire economy and business of the nation.

2. In this, the initial, case before it involving small, local, temporary construction in a single building, the Board had at first adopted, but has now abandoned, the view stated herein by the Chairman that: "The General Counsel having seen fit to prosecute this case, I believe that the Board is under a duty to complete the task by asserting jurisdiction" (R. 62).

Obviously, as the above later cases show, the Board has now determined that there is no such "duty" to follow the General Counsel in his almost unlimited interpretation of the application of the Taft-Hartley Act, and has further determined that the meaning and policy of that Act is far more restricted in the field of purely local construction, even where such construction is not for a private owner but for a company or contractor engaged in the construction business.

As is well known, this cleavage in interpretation, which has come into the open between the General Counsel and the Board, has been considered and made the subject of authoritative pronouncements by Committees of Congress.

Pronouncements by Committees of Congress against the General Counsel's Interpretation of the Taft-Hartley Act

In early 1948 joint sub-committees of the House Committee on Expenditures in the Executive Departments and of the House Committee on Education and Labor were created to investigate the scope of the disquieting interpretation by the General Counsel of the NLRB of the term "affecting commerce" as used in the Taft-Hartley Act. These sub-committees made a unanimous Report on May 26, 1948 (80 Congress, 2nd Session, House Report No. 2050) which was thereupon approved and adopted by the full Committee on Expenditures without a dissenting vote. This Report disclosed that the General Counsel, Mr. Denham, had officially stated that (pp. 5, 6):

> "The present thought of the Board * * * is that it is a rare case in which business does not affect commerce in some degree and that where commerce is affected the Board has jurisdiction. * * * I can conceive of very few businesses over which there is not at least technical jurisdiction."

The sub-committee noted that, since the jurisdiction section of the Taft-Hartley Act had been taken verbatim from the Wagner Act, Congress did not intend to enlarge the scope of jurisdiction under the new Act. In its findings the sub-committee stated (p. 5 of House Report 2050):

> "Your subcommittee is certain that it was not the intention of Congress to include in the jurisdiction of the National Labor Relations Board every small, local business which drew a small portion of its supplies or merchandise from beyond the borders of a State or Territory. * * *
>
> "The subcommittee is of the opinion that this new interpretation proposed by the general counsel of the

Board to be placed upon the term 'affecting commerce' is not warranted either by the previous history of interpretation and administration of the Wagner Act, by the debates on the bill or by the terms of the Act itself; that such interpretation is not necessary to effectuate the purposes of the act.

"The subcommittee looks upon this proposed interpretation as an attempt, by administrative interpretation, to give the country administrative law in the place and stead of law enacted by the Congress. • • • Our national history does not afford a more striking example of bureaucratic aggrandizement."

This Report was thereupon approved by the whole Committee on Expenditures, without dissenting vote, and forwarded to the Speaker.

POINT II

The Board was also without jurisdiction, and the Labor-Management Relations Act, 1947, did not apply, because the local work stoppage did not involve interstate commerce but (as the finding is, R. 27, 53, 60) "simply a concerted refusal to continue working with the non-union workers, in accordance with local established union precedent."

After having expressly requested and stipulated for a local union job (R. 100), Stanley later injected into the work while in progress non-union men to take over part of the employment of the union men which, admittedly, they were performing satisfactorily (R. 107).

Section 8(b)(4)(A) was never intended to be wielded by an owner as a sword for the subversion of union employment which he himself had created.

The Board has seemingly thought that the simple way to dispose of the case was to accept the testimony of Stanley that on the afternoon of August 21 he had asked Henderson how the union men could be brought back to his residence and "Henderson suggested that Stanley cancel his contract with Watson as a means of getting the carpenters to return to work" (R. 57). The Board deduced therefrom that an object was to force Stanley to cease doing business with Watson's (R. 57-8).

Aside from the fact that this testimony by Stanley was explicitly denied by Henderson, Parker, Rose, Stewart and Larkin, all of whom were present at the time (R. 157-8, 141-2, 161, 163), the legal fallacy behind the Board's finding and in the legal consequences which it draws therefrom lies in the over-simplification and in ignoring and even distorting the setting and the order of events as established by the admitted facts and other findings.

(1) After having admittedly requested and set up the work in his residence, including the installation of floor and wall coverings, as an exclusively union job by a union contractor who was a member of the Union, Stanley admittedly and deliberately made a unit contract with Watson's (a non-union employer) whereby Watson's, for a single lump sum, was *both "to furnish and install"* (R. 195),—and this in the face of admitted warnings that the union men would not continue in their work on the job if he thus transferred the installation of floor and wall coverings to non-union men employed by a non-union employer (R. 95, 103, 109, 145, 148).

The carrying out of that contract necessarily meant that Stanley was, by his own act, changing the 100% union job, which he had himself set up, to a partly non-union job whereby the installation was transferred from the union contractor and his union employees to a non-union contractor and to his non-union employees.

In consequence, even if Henderson *did* make the statement to which Stanley testified, *Henderson was right.* As long as installation remained an integrated part of the Watson contract, the Union and its members would not acquiesce in this subversion by Stanley of the 100% union job and of their employment as he himself had originally set up and stipulated for.

Any consequence was an incident of Stanley's own act and object.

There is neither contradiction nor challenge of the testimony of Henderson and Parker that the Union and its members were at all times willing themselves to lay Watson's materials and had done so on other occasions (R. 138, 146).

Indeed, Watson's store manager himself confirms this testimony as to the union's willingness to lay Watson's materials, because he testified that Stanley at first tried to buy Watson's material *without* installation by Watson's men, but that in this instance Watson's refused to sell the material unless it also installed it by its own non-union

men (R. 89). Indeed, the Examiner expressly found that in this instance "Watson's insisted on installing the coverings it sold" (R. 19). This finding was confirmed by the Board (R. 53), and it is incorporated in the opinion of the court below (R. 202).

Thus, the labor disruption at Stanley's residence was both *primary and direct* as between Stanley and the Union both in its origin and in its result. It was the consequence of Stanley's own subversion of the union men's working conditions at his residence. It was neither secondary nor a boycott of any merchandise whatever. The same result would have happened if non-union substitutes had been sent in from any other source. The consequence as regards Stanley's contract for installation by Watson's was an incident created by Stanley himself and incidental to his own chosen object.

As long as Stanley's contract with Watson's *for installation* stood, the union men would not and could not continue on the job. If Stanley wanted the union men to stay on the job, then, as Henderson said, the *installation* must be by them and not by Watson's non-union men. On the other hand, since Stanley had chosen *installation* by Watson's men, the union men would withdraw.

In other words, the event on August 21 concerned not the material but the Working Rule, the original agreement for union employment and the crafts jurisdiction (R. 146).

Stanley had, in the face of full warning, created his own dilemma. He could not extricate himself by forcing servitude and breach of obligation upon union members. *It was Stanley who had introduced and initiated the element of force.*

It was he who had first formed "an object",—an object adverse to the Union and to the union employment which he himself had contracted.

Obviously, Section 8(b) (4) (A) was never intended to be thus wielded by an owner *as a sword* for the subversion of union employment which he himself had created.

Whatever extraneous "object" there was, was the object of Watson's and Stanley in their making of a unit lump sum contract for *both furnishing and installing*. In that act their object was to subvert the 100% union job and employment and to force Parker and his union men to cease doing the installation work in accordance with Parker's contract with Stanley.

(2) As already stated, the Examiner himself expressly found and the Board confirmed (R. 27, 53, 60), that:

> "There was no attempt (by the petitioners) to prevent Watson's employees from working on this or any other job. There was no picketing or any of the usual methods used to persuade employees not to work —*simply a concerted refusal to continue working with non-union workers, in accordance with long established union precedent.*"

The Examiner also found and the Board confirmed (R. 21, 53, 60) that:

> "Business Agent Henderson testified credibly that it was and had been for many years the practice of Local 74 not to permit their union members to work on a job where non-union workers were employed; that, in this instance, Local 74 ordered the work stoppage of its members when it learned that non-union employees of Watson's were also working on the Stanley residence; and that it would have been a violation of the rules of the Union for the carpenters to have returned to that particular job on August 22 or thereafter."

The Examiner also found and the Board confirmed that the union men were competent and skilled to lay floor and wall coverings (R. 16, 20, footnote 15); and Stanley expressly admitted that the Union men were performing their working satisfactorily (R. 107).

Before Stanley made his contract with Watson's for the installation by Watson's non-union employees, Stanley, as he admitted, was fully informed by Parker of the foregoing union rule and practice (R. 145, 146); and, moreover, Parker had also protested to Stanley that the use of Watson's employees rather than Parker's employees would be a breach of the contract between them (R. 148).

Nevertheless, Stanley decided, with profanity and at Watson's instigation, to inject Watson's non-union men into the work while in progress and to transfer to them some of the employment for which he himself had asked Parker to employ union men (R. 19, 95, 100, 145). Thereby Stanley's own violent and disruptive choice created an issue as to the maintenance of the union working conditions which Stanley himself had initially requested and for which he had stipulated (R. 100).

The result on August 21, 1947, was the primary and direct consequence of Stanley's own subversion of the union men's working conditions at his residence and of his own set-up of the job as a union job.

Hence, the event at Stanley's house was purely a local collision created by Stanley between an attack upon and an observance of a long-standing Union Working Rule (R. 21), and by Stanley's repudiation of his original desire and contract that union men, employed by Parker, do the work (R. 100). It was the Union's inevitable and predicted reaction to local ouster from employment and to local invasion of its crafts jurisdiction. *To quote the concession in the Board's own brief* in the court below (p. 8):

> "* * * it would have been a violation of the rules of the Union for the carpenters to have returned to that particular job on August 22 or thereafter."

(3) The Labor-Management Act, 1947, in no way bans, or constitutionally could ban, such a Working Rule, policy and practice or the observance of it.

As in the case of workmen in the building construction industry, these union men were transitory and not permanent employees, and they were employed *at will* for this particular job (R. 144, 162-3). They were entirely free to discontinue when Stanley deliberately interjected non-union working conditions in violation of the orginal understanding, and with the intention of transferring to non-union men some of the work for which the union men had been employed.

The union and its members not only had the right, but it was their duty, to observe and obey the Union's Rule. For any one of them to have done otherwise would have been a violation of Section 43K (p. 36) of the Constitution of the United Brotherhood (Ex. 3), punishable under Section 55C by expulsion, suspension or fine.

(4) The seriousness of the Board's error is reflected in its prototype in the following formulation in the Intermediate Report of the Examiner (R. 28):

> "In other words, the carpenters struck the job as a means of 'forcing or requiring' Stanley to hire union installers. The only way Stanley could acquire union installers was by breaking his agreement with Watson's."

This, we submit, is pure *tour de force*. The Local's Working Rule and the like rule and practice of the United Brotherhood itself long antedated the Stanley job (R. 21). Before he made his contract with Watson's, Stanley was explicitly warned of the consequences of attempting, at the insistence of Watson's (R. 19), to force a breach of the Rule and to breach his own contractual understanding that Union men would be employed "to do the work" (R. 100).

There is nothing in the Act or in any principles of law which required the Local and its members to surrender the Rule, their agreed employment and their crafts juris-

diction in submission to the concerted attack of Watson's and Stanley. Any statute which carried such compulsion would be clearly unconstitutional.

(5) The Board speaks of "The Respondents' strike order (of August 21), which admittedly was never rescinded" (R. 59).

Such language misstates the basic facts. Henderson's so-called "order" of August 21 was not personal or impromptu. It was merely the voice of the pre-existing and continuing Union Rule, practice and policy; and it was the Rule and Stanley's continuing breach of his own contractual understanding which foreclosed its rescission. The Rule was part of a continuing mutual contract between the Local's members; and, for purposes of its observance, Henderson was merely the agent and mouthpiece of all the Local's members,—both on and off the Stanley job,—indeed, of all the members of the United Brotherhood itself.

Rescission of the so-called "order" would not have changed in the slightest the obligatoriness and imperativeness of the Brotherhood's and the Local's fundamental law and practice, or of the constituted mutual contract between all the members.

Stanley confronted the union men with a choice between violating their union obligations and withdrawal from the job. They chose the latter; and that choice was both their right and their duty.

Stanley forced this choice as much on August 22 and thereafter as he had on August 17 to 21. Since his own decision on August 15 was permanent, neither he nor any one can deny the lawfulness of the permanence of its consequence with the Union as to the Stanley job.

POINT III

Section 8(b) (4) (A) was not in effect when the union and the union men withdrew from the Stanley job on August 21, 1947, immediately following Stanley's injection of non-union men into their employment.

In consequence, the petitioners were not guilty of an unfair labor practice on August 22 when the Section took effect, in not thereupon rescinding the withdrawal and thus requiring the union men to return to the different, non-union and less advantageous employment and working conditions which Stanley had just created.

(1) This is not a case which can be argued as if Stanley had not, just before Section 8 of the Act took effect on August 22nd, converted what he himself had set up as a union job into a non-union job.

The Union and its members had accepted the employment at will in Stanley's residence because the employment was by a union contractor (a fellow member of their own Local 74) and because Stanley himself had asked Parker to employ union men to do the job (R. 19, footnote 13; 100). *It was a union job 100%* (R. 19, footnote 13).

But when on August 15, 1947, by contract with Watson's, Stanley took the laying of the wall and floor coverings from Parker and his union employees and transferred it to Watson's and Watson's non-union employees and on August 18th caused the latter to take over the installation "during the regular working hours" (R. 19, 185), the entire base, extent and conditions of the employment of the union men became changed by Stanley's own act.

Hence, when Section 8 of the Act took effect on August 22nd any rescission by the Petitioners of the decision and concerted withdrawal of the day before (entirely law-

ful when made) would have required the union men and the Union itself to accept a relationship to the job and an employment and working conditions which were completely different from and less advantageous than what they had originally agreed to and what Stanley had originally set up and stipulated for (R. 100).

Hence, we respectfully submit, the Board and the Court below, in holding that the Petitioners were bound to rescind when Section 8 took effect, completely overlooked that thereby an employment relationship would have come into existence altogether different from that which had been originally agreed to by Stanley, Parker and the Union.

Certainly no provision of the Act condemns as an unfair labor practice any failure or refusal to create or accept new and less advantageous terms of employment, or new and less advantageous working conditions, or a transfer of current jobs from the union employees of the union contractor to the non-union employees of a non-union contractor.

When the union men quit on August 21st everyone understood that their quitting was as permanent as was Stanley's switch of the installation work to Watson's non-union men (R. 86, 99, 100-1, 106-7, 114, 128, 141-2, 158, 160). Indeed, the Examiner has found and the Board has confirmed, in accordance with undisputed testimony (R. 21, and footnote 20; 53):

> "On August 22nd Parker telephoned Watson's that the installation could be resumed. Two or three days later Watson's men returned to the job and completed their work about August 28. • • •
>
> "Henderson's testimony is also credited that in his capacity as business agent for the Union *he was not asked at any time after August 21 by either Stanley or Parker to order the union carpenters to return to the Stanley job.*" (Italics ours.)

(2) The decisions cited by the Board and the Court below have no parallelism in their facts.

If the Petitioners had rescinded on August 22nd or thereafter and the union men had been sent back to the Stanley job, the union and its members would have been accepting fewer jobs, less work and less advantageous terms of employment and working conditions than they, Stanley and Parker had agreed upon when the work was first undertaken in the early part of August.

There are no such determinate facts in any of the cases cited by the general counsel or the court below. In all those cases the so-called strike was for better terms,—not because the existing agreed terms had been withdrawn.

Moreover, there is no provision in the Labor-Management Relations Act, 1947 which, in the face of Stanley's own action just before Section 8 took effect, laid any such compulsion on either the Petitioners or the union men, or required submission to any such subversion of the original employment.

In his decision in this matter, denying the General Counsel a preliminary injunction, Judge Darr had said (74 F. Supp. 499, 501):

> "Certain it is that the Act is prospective in its intentions. • • • These words (Section 8(b) (4) (A)) appear to clearly indicate the affirmative action in striking or failing to perform services and not a continuation of a condition that was lawfully set up prior to the enactment of the Act. • • • I have concluded that this is not a case under the Act."

This judicial language is the more applicable since if the Act does not extend to "a continuation of a condition that was lawfully set up prior to the enactment of the Act", then *a fortiori* it does not project the requirement of future acceptance of terms, extent and nature of employment less advantageous than had been lawfully set up prior to the enactment of the Act.

As said by this Court in *Shwab* v. *Doyle*, 258 U. S. 529, 534:

> "The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. 1 Kent. 455; *Eidman* v. *Martinez*, 184 U. S. 578; *White* v. *United States*, 191 U. S. 545; *Gould* v. *Gould*, 245 U. S. 151; Story, Const., §1398. The comment of Story is, 'retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.'"

See also *White* v. *United States*, 191 U. S. 545, 552.

3. Moreover, in the cases cited by the General Counsel, the owner had not created new and adverse labor relationships shortly before the Act took effect. They were all cases where there had been a prior refusal to grant or to bargain over demands for better wages or working conditions, and where, after the Act took effect, there were *overt affirmative acts* for the purpose of additional pressures to obtain such betterments. (See, for example, *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. 2d 134, 139.)

In the present case, there is neither claim nor proof that after August 21, 1947, the Petitioners or the members of the Union took any overt or affirmative action whatever on or against the job at the Stanley residence, or even picketed it or threatened to picket it.

(4) Since Stanley, with the cooperation of Watson's, had chosen to terminate the old and agreed conditions before Section 8 took effect, he could not thereafter invoke Section 8 to bring about an acceptance of the new conditions which he had chosen to substitute.

POINT IV

Should Section 8(b) (4) (A) be so interpreted and applied as to have required the Petitioners on August 22nd to "rescind" the so-called "Order" of August 21st and thus require the union men to return to the lesser employment under non-union conditions substituted by Stanley, such an interpretation and application of the Section would violate the First, Fifth, Tenth and Thirteenth Amendments to the Constitution of the United States.

(1) On uncontradicted testimony the Examiner found and the Board confirmed that the traditional union practice and this Union's Working Rule against sharing a job with non-union men had been in force and observed "for many years"; that Henderson's so-called "order" was in obedience to it; that the withdrawal on August 21 had been "in accordance with long established union precedent"; and that the return of the union men on August 22 "would have been a violation of the rules of the Union" (R. 21, 27, 53, 60).

The Board's own Brief in the court below conceded that "it would have been a violation of petitioner union's rules for the carpenters to have returned to the Stanley job on August 22 or thereafter" (p. 8).

Observance on August 21 of that traditional union practice and of this Working Rule was, it is undisputed, wholly lawful. How then, constitutionally speaking, could its continued observance on August 22 become *ex post facto* unlawful?

This Working Rule was lawful when made. It had been given sanction and obligation by the United Brotherhood itself. Similar rules, as the decisions of the courts show, are familiar and long-standing tenets of Organized Labor. Without such rules and practice Organized Labor could

easily be disrupted by its enemies and by non-union labor.

Furthermore, this traditional practice and this Working Rule constituted a lawful part of the mutual *contract* between the members of the Local, *and a lawful part of the agreement with Stanley* when he requested of Parker that all employees on the job be, like Parker himself, union men (R. 100).

The officers of the Local were merely the agreed spokesmen and representatives of the members for the observance of this essential union practice and of the agreed working conditions. For that purpose Henderson was acting merely as the agent of all the Local's members, both on and off the Stanley job.

(2) Lawful observance of the agreed working conditions set up by Stanley himself (R. 100) and of the traditional practice and the Working Rule, once begun, could not be outlawed and the opposite rendered directly or indirectly compulsory by subsequently effective legislation.

Such subsequent legislative requirement or coercion would violate the First, Fifth, Tenth and Thirteenth Amendments to the Constitution of the United States.

It would abridge freedom of speech, deprive the petitioners of liberty and property without due process of law, exercise a power not delegated to the United States by the Constitution, and impose involuntary servitude in a case where punishment for crime is not involved.

We live in a free society and under a Constitution which guarantees a free society.

There can be no freedom and no free society if men, in time of peace, can be compelled to work against their will, or to sell their labor contrary to their own wish or for purposes which they deem contrary to their own interests, or to continue with or resume an at-will employment where the nature and substance of that employment and the working conditions have been changed to their disadvantage according to their judgment. (*Hotel & Restaurant Employees*

v. *Greenwood*, 30 So. (2d) 696; cert. denied 332 U. S. 847, January 5, 1948.)

The liberties guaranteed in the foregoing constitutional Amendments include in each case personal liberties and not merely political liberty or property rights.

(3) Outstanding is the declaration of the Supreme Court in *Hunt* v. *Crumboch*, 325 U. S. 821 that (p. 824):

> "They (workmen) can sell or not sell their labor as they please."

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, the Supreme Court said (p. 589):

> "The liberty mentioned in that Amendment (the Fourteenth) means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; *to live and work where he will;* to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." (Italics ours.)

The language of the Fourteenth Amendment as thus interpreted by the Supreme Court is identical with the corresponding language of the Fifth Amendment directed at the national government.

To the same effect are:

Meyer v. *Nebraska*, 262 U. S. 390, 399;
Lawton v. *Steele*, 152 U. S. 133, 137;
Truax v. *Raich*, 239 U. S. 33, 41;
Baker v. *Daly*, 15 Fed. 2d 881, 882.

The following general statement of the constitutional principle embodied in these decisions occurs in 11 *Am. Jur. Constitutional Law*, 346:

> *"The liberty to terminate employment contracts is fully protected as far as the employee is concerned.* An act which requires one to remain in the service of another whom he does not desire to serve is invalid because an employee cannot constitutionally be compelled to work against his will for any employer and is at liberty to refuse to continue to serve him." (Italics ours.)

In *Arthur* v. *Oakes*, 63 Fed. 310, the Court said (p. 317):

> "It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude—a condition which the supreme law of the land declares shall not exist within the United States or in any place subject to their jurisdiction."

In *Bailey* v. *Alabama*, 219 U. S. 219, the Supreme Court declared unconstitutional as violative of the Thirteenth Amendment, a state statute which made the refusal or failure to perform labor contracted for without refunding the money or paying for property received, *prima facie* evidence of the commission of a crime as defined by a section of the Act. The Court said (p. 244):

> "Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question (*Henderson* v. *Mayor*, 92 U. S. 268), and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid; an instrument of compulsion peculiarly effective as against the poor and

the ignorant, its most likely victims. There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based."

The Supreme Court also said, concerning the Thirteenth Amendment, page 241:

"• • • The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude."

(4) These constitutional guarantees necessarily guarantee the right of a union man to decline to work on the same job and cooperatively with non-union men, particularly where the work being done by the non-union men is part of the work for which the union men were themselves employed and part of the jurisdiction or craft of the union.

These constitutional guarantees also assure the right of unions to adopt working rules and practices such as the Examiner found here established "for many years" (R. 21).

As said in *Coppage* v. *Kansas*, 236 U. S. 1, pages 19-20:

"• • • Can it be doubted that a labor organization —a voluntary association of working men—has the inherent and constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with non-union men? Or that a union man has the constitutional right to decline proffered employment unless the employer will agree not to employ any non-union man? • • •"

In *Bossert* v. *Dhuy*, 221 N. Y. 342, the New York Court of Appeals said, pages 354-5:

> "It is unnecessary in the case now under consideration to hold that in all cases and under all circumstances, whatever a man may do alone he may do in combination with others, but it was clearly established in the National Protective Association case that workingmen may organize for purposes deemed beneficial to themselves and in that organized capacity may determine that their members shall not work with non-members or upon specified work or kinds of work.
>
> "It was not illegal, therefore, for the defendants to refuse to allow members of the Brotherhood to work in the plaintiffs' mill with non-union men. The same reasoning results in holding that the Brotherhood may by voluntary act refuse to allow its members to work in the erection of materials furnished by a non-union shop. Such action has relation to work to be performed by its members and directly affects them. The voluntary adoption of a rule not to work upon non-union made material and its enforcement differs only in degree from such voluntary rule and its enforcement in a particular case."

In *Stapleton* v. *Mitchell*, 60 Fed. Sup. 51, appeal dismissed, 326 U. S. 690, the Court held unconstitutional a Kansas statute which made it unlawful for an employee to "refuse to handle, install, use, or work on particular materials or equipment and supplies because not produced, processed, or delivered by members of a labor organization." The Court said (p. 61):

> "The right to peaceably strike or to participate in one, to work or refuse to work, and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liber-

ties which the state may not condition or abridge in the absence of grave and immediate danger to the community."

In *Alabama State Federation of Labor* v. *McAdory*, 18 So. 2d 810, the Supreme Court of Alabama reviewed the constitutionality of Section 12 of an Alabama statute regulating labor unions. Section 12 made it unlawful for any employee to refuse to handle any work or materials, etc., because not produced or delivered by union members. The Court held this section of the Act unconstitutional on the ground "that it violates fundamental and basic civil rights as guaranteed under the Fourteenth Amendment."

(5) Moreover, the right to sell or not to sell one's labor or services is *not only a right of liberty but a right of property*. As a right of property it is equally protected by the constitutional guarantees.

Coppage v. *Kansas*, 236 U. S. 1, 14;
Adair v. *U. S.*, 208 U. S. 161, 173-175;
Bogni v. *Perotti*, 112 N. E. (Mass.) 853, 855;
State v. *Stewart*, 59 Vt. 273, 289.

POINT V

In any event, on August 22, 1947, and thereafter, there was, as a matter of law, (1) no justification for "A Cease and Desist Order"; and (2) no justification for not applying the *de minimis* principle.

(1) The testimony is all unanimous, and the Examiner and the Board so found, that the entire work at Stanley's residence (including the installation of Watson's materials) was completed within a few days, to-wit by August 28 (R. 17-8, 21, 58).

The Examiner and the Board held that the picketing of Watson's store, discontinued by August 28, 1947, was not an unfair labor practice (R. 17-8, 22-3, 60).

Watson's filed no charge until August 29. Its amended charge was filed September 15 (R. 183).

The Examiner expressly found, and the Board confirmed the finding (R. 27, 53, 60), that:

> "There was no attempt (by the Petitioners) to prevent Watson's employees from working on this or any other job. There was no picketing or any of the usual methods used to persuade employees not to work—simply a concerted refusal to continue working with the non-union workers, in accordance with long established union precedent." (Parenthesis supplied.)

The Examiner also expressly found, and the Board confirmed the finding (R. 21, footnote 20; 53, 60):

> "Henderson's testimony is also credited that in his capacity as business agent for the Union he was not asked at any time after August 21 by either Stanley or Parker to order the union carpenters to return to the Stanley job."

There was no proof, evidence or claim of any overt or affirmative action of any kind against Stanley's job or Watson's men employed there after August 21, 1947. There never was any picketing of the Stanley job. There is no claim that there was even a threat to picket it. Hence, there was no more justification for the issuance of an administrative injunction order by the Board than, as Judge Darr held, there was for the issuance of an injunction order by the Court.

(2) Injunction orders, whether or not couched in terms of "cease and desist", cannot lawfully be issued merely as exhortation, or as advice, or on suspicion, or as a punishment, or where, as Judge Darr ruled, the case is "moot" (74 F. Supp. 499, 502).

Thus, in *Walling, Administrator of Wage and Hour Division* v. *Livrenois,* 50 F. Supp. 978, the Court said (p. 980):

> "We do not believe in government by injunction to begin with nor do we believe that there is evidence of prospective further violation if this defendant returns to the business of manufacturing bricks. Where such a probability does not exist there is no need of an injunction. *Fleming* v. *Phipps,* D.C., 35 F. Supp. 627; *Fleming* v. *National Bank of Commerce of Charleston,* D.C., 41 F. Supp. 833; *Walling* v. *Woodruff,* D.C., 49 F. Supp. 52; *Walling* v. *Builders' Veneer & Woodwork Co.,* D.C., 45 F. Supp. 808."

In *Walling* v. *Nashville, Chattanooga & St. Louis Ry.,* 60 F. Supp. 1004, the Court said (p. 1008):

> "So even if they are 'employees', which the court holds that they are not, there is no necessity for an injunction, the purpose of an injunction being to prevent future violations, not to punish past violations."

This decision was affirmed by the Supreme Court of the United States in 330 U. S. 158.

To the same effect is *Walling Administrator of Wage and Hour Division* v. *Todd*, 52 F. Supp. 62, 66.

The cases heretofore cited by the General Counsel are readily distinguishable.

Pennsylvania Greyhound Lines, Inc., Case No. C-1, December 7, 1935; 1 N. L. R. B. 1;
Pacific Greyhound Lines, Case No. C-134, December 16, 1936; 2 N. L. R. B. 431;
Carlisle Lumber Company, Case No. C-93, September 26, 1936; 2 N. L. R. B. 248.

In the first place, these cases arose under the original National Labor Relations Act enacted July 5, 1935, which dealt solely with unfair labor practices of employers, and they were not concerned with unfair labor practices of labor unions. None of the cases is in point factually.

In the second place, in all the cited cases there were definite over affirmative acts committed by the employer amounting to unfair labor practices *after* the effective date of the Act, and showing affirmatively a definite intention to continue to conduct a campaign of interference, restraint and coercion, notwithstanding the taking effect of the Act.

(3) Moreover, the Chairman of the Board has referred to this controversy as one *"so local and so diminutive"* (R. 62); and such was the ground of the dissent in the Board (R. 63).

It is a very familiar principle that the law "is not concerned with trifles", and that restraining orders will not be issued against them. *De minimis lex non curat.*

Reuter v. *Walling*, 137 F. (2d) 315, 319, C. C. A. 5);
Virginia Electric & Power Co. v. *National Labor Relations Board*, 115 F. (2d) 414, 422-3 (C. C. A. 4); reversed on other grounds 314 U. S. 469.

In *Groneman* v. *International Brotherhood of Electrical Workers,* 177 F. 2d 995 (C. C. A. 10), decided November 4, 1949, the charge was a secondary boycott and illegal picketing by the defendants. Certain union carpenters had left a construction job *for nine days,* thereby delaying the completion of the job for that brief period. Although the charge was that the objective of the strike was a secondary boycott, the suit for damages under Section 303 (b) of the Labor-Management Act of 1947 was dismissed for the reason that the effect of such brief construction delay upon interstate commerce was so slight as to fall within "the *de minimis* doctrine."

CONCLUSION

The petition for a writ of certiorari, as prayed for, should be granted.

Dated, May 19, 1950.

Respectfully submitted,

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Appendix

Labor-Management Relations Act, 1947—Sec. 2 (6)

When used in this subchapter—

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(29 U. S. C. Sec. 152 (6))

Labor-Management Relations Act, 1947—Sec. 2 (7)

When used in this subchapter—

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(29 U. S. C. Sec. 152 (7))

Labor-Management Relations Act, 1947—Sec. 8(b)(4)(A)

(b) It shall be an unfair labor practice for a labor organization or its agents—

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment

to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(29 U. S. C. Sec. 158 (b)(4)(A))

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IN THE

Supreme Court of the United States

October Term, 1949

No. 85

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. of L., and JACK HENDERSON, Individually and as Agent for Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L.,
Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF OF LOCAL 74 AND JACK HENDERSON IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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307 BAR PRESS INC., 54 LAFAYETTE ST., NEW YORK 13 — WA. 5-2432-3

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I

The Board's brief makes the following concession of fact (p. 8):

> "Henderson gave the order in accordance with a long standing rule of Local 74 not to permit its members to work on a job where non-union workers are employed. He testified that since Watson's non-union employees were working on the Stanley residence, it would have been a violation of the rules of Local 74 for the carpenters to have returned to that job on August 22 or thereafter. (R. 21; 136-138.)"

In view of this factual concession, there arise the following questions of law of general importance to organized labor and to industry and in the administration of the Act:

1. Does the Act purport to invalidate and annul the "long standing rule" and practice of this and other unions that members will not continue to work on a union job into which, after their employment, non-union workers have been injected,—particularly where such non-union men have been injected to take over portions of the work for which the union men had been employed and which they were performing?

2. If the Act does so purport, is it constitutional?

3. Since, as the Board's brief thus concedes, Henderson gave the order "in accordance" with this long standing rule and gave it before the Act took effect, does the Act purport to require that, after its effectual date, the order be rescinded and the Union's members be ordered back to the work, notwithstanding that the non-union men were in continued possession?

4. If the Act does so import, is it constitutional?

See Points II, III and IV of our Main Brief, pp. 34, 41 and 45.

II

The Board's brief contains the further concessions of fact as to what occurred *"while the work was in progress"* (pp. 6, 7):

> "Watson insisted that its own employees who were non-union, *must install any coverings it sold.* • • • Parker and Stanley discussed the complications that might arise with the union employees employed

> at the Stanley residence if Watson's non-union workmen installed the coverings. * * * Thereupon Stanley made a special contract with Watson for the purchase and installation of the floor and wall coverings." (Italics ours.)

In other words, "while the work was in progress" pursuant to the union contract made by Stanley with Parker (himself a member of the union), and while the union men were satisfactorily performing, Stanley, with full knowledge of the union rule and with full warning by Parker "of the complications that might arise", agreed with Watson to turn over to Watson and its non-union employees a portion of the jobs for which the union men had been employed.

Notwithstanding these concessions of fact, the Board, in substance, rests its case (p. 8) on the finding that at the time when Henderson issued his order on August 21, Stanley asked how the union men could be brought back; and

> "Henderson suggested that Stanley cancel his contract with Watson as a means of getting the carpenters to return to work."

But what other way was there? Watson had insisted and Stanley had contracted that Watson's non-union men be injected into union work then satisfactorily in progress under a union contract made in accordance with Stanley's own testimony that "it was my understanding with Parker that union men were going to do the work" (p. 100).

In other words, Watson had demanded, and Stanley had agreed to give Watson by this contract knitting together both purchase and installation, an effective sword whereby it could force its way into this exclusively union work and secure a transfer of some of it to its non-union employees.

Since Watson had with purpose, and Stanley had by contract, created this act of aggression, how could the

union or its members be expected—much less required—to continue with or return to the work in the face of the aggression thus enforced?

How, under the conceded circumstances and under the Act and the Federal Constitution, could the freedom of the union and its members be nullified by this provocative contract?

III

On page 28 of our Main Brief, we stated:

> "As far as we can ascertain, the present case was the first, involving local temporary construction in *a private residence*, to come before the Board."

We then cited four subsequent decisions by the Board dismissing cases "concerning *companies in the building construction industry* on the very ground that their business was primarily local and insubstantial."

Since those decisions, the Board has rendered three further decisions in the building industry, wherein complaints of "secondary boycott" and of alleged violations of Section 8 b 4 (A) of the Act were dismissed.

> *Denver Bldg. Trades Council*, 90 N. L. R. B. No. 66, 26 L. R. R. M. 1225 (June 16, 1950);
> *Plumbers & Steamfitters Union*, 90 N. L. R. B. No. 80, 26 L. R. R. M. 1236 (June 21, 1950);
> *Glazers Union*, 90 N. L. R. B. No. 93, 26 L. R, R. M. 1245 (June 26, 1950).

In the first case cited the Board said, concerning the view urged by its dissenting member (Mr. Reynolds):

> "He urges, in this connection that because the building and construction industry is characterized by relatively small business units, we must take for our policy-criterion in matters of jurisdiction, the sizable annual aggregate business in the industry. Yet, nowhere in the legislative history of the amended

Act or in Board decisions, we find support for this view. The same logic would extend the Federal power to the corner grocer, the neighborhood druggist, and the local restaurant, for each is part of an industry which, in aggregate has an undeniably substantial effect upon interstate commerce. Indeed, we fail to see how any business enterprise, however purely local in character, would then be free from Federal regulation."

In the second case cited, the dismissed complaint was for an alleged "secondary boycott" involving a building contractor and sub-contractors engaged in the construction of a $35,000 Salvation Army building and a $52,000 church, although the general contractor had made purchases "directly in interstate commerce" and had secured contract bonds and various forms of insurance "from companies with home offices outside of the state", and although he had purchased some of his materials from suppliers who, in turn, secured part of their stock from outside the state, and although the sub-contractors purchased materials outside of the state ranging from 25% to 99%.

In the third case cited, to wit: the *Glaezers Union* case, the dismissed complaint was for an alleged "secondary boycott" against members of a building contractors association whose members purchased some materials from without the state. The member with the largest of such purchases purchased about $145,000 annually, of which $13,000 represented materials from without the state.

IV

On page 16 the Board's brief says:

"It is settled that a changed circumstance such as that cited by petitioners, like voluntary discontinuance of an unfair labor practice, will not render moot an order of the Board lawful when made."

This statement seems to imply that what the Board's brief calls "a changed circumstance" occurred after the order of the Board was made. The fact is, and the findings so show, that Stanley's residence was completed even before any charge was filed with the Board. (See our Main Brief, p. 52.)

The fact further is, according to the express finding (R. 27, 53, 60):

> "There was no attempt (by the Petitioners) to prevent Watson's employees from working on this or any other job. There was no picketing or any of the usual methods used to persuade employees not to work—simply a concerted refusal to continue working with the non-union workers, in accordance with long established union precedent." (Parenthesis supplied.)

There was not a particle of evidence that the circumstance thus referred to ever did or ever would arise again, to wit: that an owner, who, like Stanley, had expressly contracted with a union member that the work be done by union men (R. 100), would thereafter, while the work was in progress accordingly, insist on transferring some of it to non-union men.

To disregard these actual facts and findings is, we submit, to reduce the case to academic or moot conceptions, and to authorize a cease and desist order in disregard of the facts, the law and constitutional rights.

Respectfully submitted,

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BRIEF OF LOCAL 74 AND JACK HENDERSON, PETITIONERS

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Furthermore, upon such injection, the right of the union men to withdraw and the right of Local 74 to order a withdrawal followed as a matter of Common Law and Constitutional Law, and was recognized by the proviso at the end of Section 8(b) (4) and by Sections 7, 8(a), 13 and 502 of the Labor-Management Relations Act, 1947 15

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In consequence, the petitioners were not guilty of an unfair practice on August 22 when the Section took effect, in not thereupon rescinding the withdrawal and thus requiring the union men to return to the different, non-union and less advantageous employment and working conditions which Stanley had created several days before 43

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Argued by
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Respondent.

BRIEF OF LOCAL 74 AND JACK HENDERSON, PETITIONERS

Preliminary Statement

On December 11, 1950 this Court granted a writ of certiorari to review the decree of the United States Court of Appeals for the Sixth Circuit, filed April 4, 1950, adjudging that the order of the National Labor Relations Board be enforced as prayed for in the petition (R. 197). See 340 U. S. 902.

The unanimous opinion of the United States Court of Appeals (per Martin, C. J.) appears at pages 186-196 of the Record and is officially reported in 181 F. 2d 126.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, Section 1254 of the United States Code.

The Statutes Involved

The statute involved is Section 8(b)(4)(A) of the Labor-Management Act, 1947. This section is quoted at pages 8, 9, *post*. Other sections of that Act are quoted at pages 26-28, *post*.

The Constitutional Amendments involved are the First, Fifth, Tenth and Thirteenth.

The Questions of Law Involved

In its Supplemental Memorandum withdrawing its opposition to the granting of a writ of certiorari in the present case, the National Labor Relations Board said (p. 1):

> "The Petition for a Writ of Certiorari in this case, like the petition in No. 108, this Term, poses the question whether the action of a union in calling a strike of its members employed on a construction job, because the owner thereof engaged the services of a subcontractor who employed non-union labor on the project, violates Section 8 (b) (4) (A) of the Act."

Without binding or confining ourselves to this selection and phrasing of matters of law underlying this case, we state as follows our conception of the fundamental questions of law involved:

I

Stanley, at whose private residence the union men were at work, conceded that he had made a cost-plus union contract for the construction work therein with B. F. Parker (an independent union contractor and himself a member of the petitioner, Local 74), and that he (Stanley) had stipulated for union men to do the work (R. 96):

> "I wanted Union men and had always enjoyed having Union men working, preferred them because I thought their work was better, and that Parker—*it was my understanding with Parker that Union men were going to do the work.*" (Italics ours.)

He also conceded that the union men were doing the work satisfactorily (R. 103), and that, while the work was in progress, he made a unit contract with Watson's Specialty Store whereby the non-union employees of that store would replace the union men in installing floor and wall coverings purchased by Stanley at Watson's, nowithstanding that he was warned by Parker that, as a consequence, the union men would quit the job (R. 140-1).

1. Does Section 8(b)(4)(A) of the Labor-Management Relations Act, 1947, make it an unfair labor practice for the union thereupon to withdraw its members from the Stanley job?

2. If so, would the Section be constitutional?

II

The Board's Main Brief, filed in support of its former opposition to the petition for certiorari, made the following concession of fact concerning the action of the petitioner Henderson, the business agent of the petitioner Local 74, in ordering withdrawal from the Stanley job on August 21, 1947 (p. 8):

> "Henderson gave the order in accordance with a long standing rule of Local 74 not to permit its members to work on a job where non-union workers are employed. He testified that since Watson's non-union employees were working on the Stanley residence, it would have been a violation of the rules of Local 74 for the carpenters to have returned to that job on August 22 or thereafter. (R. 21, 136-138.)"

In view of this factual concession, there arise the following questions of law of general importance to organized labor and to industry and in the administration of the Act:

1. Does the Act purport to invalidate and annul the "long standing rule" and practice of this and other unions that members will not continue to work on a union job into which, after their employment, non-union workers have been injected,—particularly where such non-union men have been injected to take over portions of the work for which the union men had been employed and which they were performing?

2. If the Act does so purport, is it constitutional?

III

The Board's Main Brief also contained the following further concessions of fact as to what occurred *"while the work was in progress"* (pp. 6, 7):

> "Watson insisted that its own employees who were non-union, *must install any coverings it sold.* * * * Parker and Stanley discussed the complications that might arise with the union employees employed at the Stanley residence if Watson's non-union workmen installed the coverings. * * * Thereupon Stanley made a special contract with Watson for *the purchase and installation* of the floor and wall coverings." (Italics ours.)

1. Since Watson had with purpose, and Stanley had by contract, created this act of aggression against the union employment which Stanley had himself established, how could the union or its members be expected—much less required—to continue with or return to the work in the face of this deliberate subversion of their working conditions?

2. How, under the conceded circumstances and under the Act and the Federal Constitution, could the freedom of the union and its members be nullified by this provocative contract?

IV

Moreover, Section 8(b)(4)(A) was not in effect when the Union and the union men withdrew from the Stanley job on August 21, 1947, immediately following Stanley's injection of non-union men into their employment.

In consequence, the petitioners were not guilty of an unfair labor practice on August 22 when the Section took effect, in not thereupon rescinding the withdrawal and thus requiring the union men to return to the different, non-union and less advantageous employment and working conditions which Stanley had created several days before.

V

Should Section 8(b(4)(A) be so interpreted and applied as to have required the Petitioners on August 22nd to "rescind" the so-called "Order" of August 21st and thus require the union men to return to the lesser employment under non-union conditions substituted by Stanley, such an interpretation and application of the Section would violate the First, Fifth, Tenth and Thirteenth Amendments to the Constitution of the United States.

VI

The Court below erred in holding that the Board had jurisdiction.

The brief construction job in Stanley's private residence was so essentially local, separate and transitory as not to fall within the interstate commerce clause, and hence not within the Labor-Management Relations Act, 1947.

VII

In any event, on August 22, 1947, and thereafter, there was, as a matter of law, (1) no justification for "A Cease and Desist Order"; and (2) no justification for not applying the *de minimis* principle.

The Proceeding

The Charges

The Petitioners were charged by the General Counsel's complaint with unfair labor practices affecting commerce within the meaning of Section 8(b), subsections (1) (A) and (4) (A), and Section 2, subsections (6) and (7) of the Labor-Management Relations Act, 1947, herein called "the Act" (R. 158-162).

The Petitioners filed an "Answer and Motion" wherein they denied the charge and moved to dismiss the complaint (R. 163).

The grounds of the Motion to dismiss were enumerated in the Answer and in Exhibit B thereto annexed (R. 165), which Exhibit was the Answer and Motion of the Petitioners to an application simultaneously filed by the General Counsel in the District Court of the United States for the Southern Division, Eastern District of Tennessee, asking for a preliminary injunction pursuant to Section 10(1) of the Act (R. 165-172, 172-177).

Included in those grounds were these Petitioners' constitutional claims under the First, Fifth, Tenth and Thirteenth Amendments (R. 33, 43, 44, 45, 171).

The Decision by Judge Darr

The Board's petition under Section 10(1) of the Act was denied by United States District Judge Darr with an extended opinion reported in *Styles* v. *Local 74 et al.*, 74 F. Supp. 499 (Oct. 28, 1947).

Judge Darr's opinion concluded as follows (p. 502):

> "In any event, my judgment is that the factual situation upon which the application is based sets up lawful conduct and therefore there can be no inference that this would indicate a future action of unlawful conduct.

Being of the opinion as herein set out, I have concluded that this is not a case under the Act and that I should not direct the issuance of an injunction pending the action of the Board."

The General Counsel took no appeal from this denial.

The Examiner's Report

The Trial Examiner's Report, dated December 29, 1947, held that there had been a violation by Petitioners of Section 8(b)(4)(A), but not of Section 8(b)(1)(A) or of any other provision of the Act; and that, as an administrative officer, he could not pass upon the constitutional issues (R. 11, 32).

His chief recommendation was that the Petitioners (R. 35):

> "1. Cease and desist from engaging in or inducing the members of Local 74 to engage in a strike or a concerted refusal in the course of their employment to perform services for any employer, where an object thereof is to require any employer, or other person to cease doing business with Ira A. Watson Company, doing business as Watson's Specialty Store, or other person."

The Petitioners filed full exceptions (R. 38), including exceptions on the constitutional grounds (R. 43, 44, 45).

The Board's Decision

In its order of November 22, 1948 (80 N. L. R. B. 533) the Board confirmed these recommendations and adopted the Examiner's findings and conclusions with certain "additions and modifications" (R. 51).

Among such modifications were the following (R. 55, footnote 10):

> "The Trial Examiner erroneously stated that the Respondents (Petitioners herein) did not dispute that

the strike order in question would have been illegal if issued after August 22, 1947."

Also (R. 54, footnote 9):

"We agree with the Respondents (Petitioners herein) that it is immaterial for purposes of this decision whether the carpenters were employees of Stanley or of Parker, who had contracted with Stanley to do certain work on the latter's residence, as set forth in the Intermediate Report."

Also (R. 58, footnote 17):

"Under the circumstances here present, we deem it immaterial whether the strike actually began on the afternoon of August 21 or on the following morning. Consequently, we do not rely on or adopt the Trial Examiner's finding that the strike did not actually begin until the morning of August 22."

In a concurring opinion the Chairman expressed the belief that the Board must assert jurisdiction since the General Counsel had "seen fit to prosecute", notwithstanding that *the controversy was "so local and so diminutive"* (R. 60).

In dissenting, the Hon. John M. Houston, a member of the Board, said (R. 61):

"I believe that the effect on commerce here is so remote and so insubstantial and that the controversy involved is so local in character as to make undesirable any exercise of the Federal power. I see no compulsive consideration in the legislative history of the amended statute which would indicate the contrary merely because the operation involved concerns the building and construction industry."

The Decision by the Court of Appeals

This decision confirmed the order of the Board and directed enforcement (181 F. 2d 126).

Summary and Concise Statement of the Case

The Statute Involved

This petition and the decision of the Court of Appeals involve the construction and application of Section 8(b)(4)(A) of the Labor-Management Relations Act, 1947, hereinafter called "the Act".

This statutory provision, as quoted in the opinion of the Court of Appeals, reads (R. 187):

> "'Sect. 8 * * * (b) It shall be an unfair labor practice for a labor organization or its agents— * * * (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person: * * *' [158(b)(4)(A), Title 29, U. S. C. A.]."

The Trade Jurisdiction of the United Brotherhood and of Local 74

The Examiner found and the Board confirmed that the United Brotherhood and Local 74 had, within its trade jurisdiction, the crafts of carpentry and laying of coverings for floors and walls; that Local 74 had, among its

members, craftsmen competent to perform work similar to that of Watson's installation employees; that the Working Rules of the Local had long provided that no member "shall be permitted to work on any job" "with a non-union carpenter" for more than one day (R. 15, 19, footnote 15; Exhibits 2 and 3, Section 7, p. 4; and R. 9); and that (R. 21, 51):

> "Business Agent Henderson testified credibly that it was and had been for many years the practice of Local 74 not to permit their union members to work on a job where non-union workers were employed; that, in this instance, Local 74 ordered the work stoppage of its members when it learned that non-union employees of Watson's were also working on the Stanley residence; and that it would have been a violation of the rules of the Union for the carpenters to have returned to that particular job on August 22 or thereafter."

Stanley's Contract for a Union Job at his Residence

On July 31, 1947, George D. Stanley purchased a house near Chattanooga for occupancy as a private home for himself and his family exclusively (R. 88, 98). On August 4, 1947, he made a written contract with B. F. Parker (an independent union contractor and himself a member of the Petitioner, Local 74) to improve portions of the interior in ways including the installation of floor and wall coverings (R. 17, 18, footnote 13; 185). Stanley testified (R. 96):

> "I wanted Union men and had always enjoyed having Union men working, preferred them because I thought their work was better, and that Parker—*it was my understanding with Parker that Union men were going to do the work.*"

Stanley's contract with Parker was the usual cost-plus contract, including both materials and labor (R. 183). Parker had the sole right "to hire and fire" (R. 98, 137-8).

In accordance with Stanley's foregoing request Parker employed, for the renovation work in Stanley's residence, *solely union men* (R. 18; and footnote 13). Under the terms of their employment, Parker's employees could quit *at will* (R. 139, 157).

The court below has correctly stated (R. 189):

> "All workmen hired by Parker were union members, including carpenters who were members of Local 74."

The work in Stanley's residence thereupon started promptly. Stanley expressly admitted that the union "were doing their work satisfactory" (R. 103).

Stanley's Subsequent Contract with Watson's

While Parker and his union men were thus engaged in the satisfactory fulfillment of this contract, Stanley decided to have a floor and wall covering then in stock at the Watson's Store whose employees for installation were exclusively non-union men (R. 16, 79, 86-88, 90-91, 100, 103, 105, 136-7).

Because of Watson's employment of non-union men, Local 74 was then peacefully maintaining a single picket in front of the store (R. 16-17). The picket was withdrawn on or before August 28, 1947 (R. 16-17, footnote 11). The Examiner has reported that there is no evidence that Watson's lost business because of this picket (R. 23, footnote 24). Both the Examiner and the Board held that this brief, peaceful picketing was entirely lawful (R. 21-25, 58-9).

Stanley has repeatedly admitted that he knew, and was warned by Parker, that if, in the installation of the floor and wall coverings in his residence, he took the work of installation away from the union men and gave it to

Watson's non-union men, the union men would quit the job (R. 92, 100, 106, 140-1, 143).

Stanley, therefore, as was admitted by Watson's store manager, had first tried to buy the material from Watson's *separately*, in order that it could be installed by Parker's union men (R. 86).

Watson's, however, saw an opportunity to strike at the Local; and (as found by the Examiner and confirmed by the Board and the court below (R. 18, 50, 56, 189)), Watson's refused to sell the coverings to Stanley at all *unless they were installed by its own non-union employees.* Thereupon Stanley made a written contract with Watson's dated August 15, 1947, *whereby, for a lump sum, Watson's was to both "furnish and install"* (R. 90, 183). Thus, this contract was double barreled,—and designed by Watson's to be so. Both barrels were loaded and pointed directly at Local 74.

Stanley has admitted that he was well aware that this act on his part would be deemed an act of provocation against the union men and against the Union's Working Rule and its crafts jurisdiction (R. 92). Nevertheless, he told both Parker and Watson's manager (R. 140): "To hell with the Union. I'll do as I please".

Watson's Non-Union Men Take the Installation Work Away from the Union's Members

Watson's thereupon adopted the strategy of getting its employees surreptitiously into physical possession of the installation work at Stanley's residence by the stratagem thus stated by the Examiner (R. 18, 90-1, 175, 189):

> "The installation work (by Watson), estimated to take a week, was started on *Sunday*, August 17, when there were no other workmen present." (Italics ours.)

On the succeeding Monday and Tuesday, August 18 and 19, Watson's provocatively challenged the Union and its

members by taking over the installation work "during the regular working hours" (Examiner, R. 18). On Wednesday, August 20, two of the union carpenters stopped work for half an hour because of the presence of non-union men (Examiner, R. 18, 19).

The Union's Members Quit the Stanley Job on August 21

On August 21 the situation at Stanley residence was as follows (Examiner, R. 55; footnote 11):

> "There were but two groups of employees then on the job: the carpenters and Watson's installation employees."

About three o'clock in the afternoon of August 21 Henderson came to the Stanley residence and told both Parker and Stanley that the union men were packing up and leaving because the non-union men were taking over the installation work (R. 19, 95-6, 100, 103-4).

Stanley testified that the union men thereupon did "pack up and leave" (R. 97, 101). The court below has correctly stated that "they did not return" (R. 189-90); and the Examiner has found and the Board has confirmed (R. 21; footnote 20):

> "Business Agent Henderson testified credibly that * * * it would have been a violation of the rules of the Union for the carpenters to have returned to that particular job on August 22 or thereafter. * * *
>
> Henderson's testimony is also credited that in his capacity as business agent for the Union he was not asked at any time after August 21 by either Stanley or Parker to order the union carpenters to return to the Stanley job."

Both Parker and Henderson testified without contradiction or challenge that the union men were entirely willing to install Watson's coverings, and that on other jobs

they had installed "material furnished by Watson" (R. 133, 141).

Stanley testified that, when he asked Henderson how he could get the union men back, Henderson suggested that he cancel his contract with Watson's (R. 55, 190). The Board accepted this piece of testimony by Stanley (R. 57), notwithstanding that Henderson, Parker and others denied it (R. 151-2, 136-7, 155, 156).

Obviously, even if Henderson made this statement, it would merely express the consequence of *the installation clause* in Stanley's *unit* contract with Watson's.

Completion at Stanley's Residence in About a Week

The union men having withdrawn on August 21, the following transpired on August 22 and thereafter (to quote the Examiner) (R. 20):

> "On August 22nd Parker telephoned Watson's that the installation work could be resumed. Two or three days later Watson's men returned to the job and completed their work about August 28. In fact all the renovating of the Stanley house was completed on or about the end of August, the unfinished carpentry being completed by two of the four union men who had been on the job (at the urgent request of Parker), but without the knowledge or consent of the Respondents" (Petitioners herein).

The Examiner found and the Board confirmed (R. 27) that the Petitioners never picketed the Stanley residence, or threatened to do so, or solicited any of Watson's employees at that job not to work there, or attempted to prevent them from working there.

POINT I

The Facts found, conceded and undisputed establish, as matter of law, that there was no violation of Section 8(b) (4) (A) when Local 74 and its members withdrew from the Stanley job after he injected thereat non-union men to take over some of their employment.

Furthermore, upon such injection, the right of the union men to withdraw and the right of Local 74 to order a withdrawal followed as a matter of Common Law and Constitutional Law, and was recognized by the proviso at the end of Section 8(b) (4) and by Sections 7, 8(a), 13 and 502 of the Labor-Management Relations Act, 1947.

A

The Facts found, conceded and undisputed

The Board's Main Brief in support of its former opposition to the petition for certiorari made the following concession of fact as to the order given at the Stanley residence by the petitioner Jack Henderson, business agent for Local 74, on August 21, 1947 (p. 8):

> "Henderson gave the order in accordance with a long-standing rule of Local 74 not to permit its members to work on a job where non-union workers are employed."

The Working Rules of Local 74 (Respondents' Ex. 2, p. 4) provided that no member "shall be permitted to work on any job" "with a non-union carpenter" more than one day, or where laborers "perform carpenter work of any kind."

The Examiner found and the Board confirmed that (R. 51; 131-3):

> "Business Agent Henderson testified credibly that it was and had been for many years the practice of Local 74 not to permit their union members to work on a job where non-union members were employed; that, in this instance, Local 74 ordered the work stoppage of its members when it learned that non-union employees of Watson's were also working on the Stanley residence; and that it would have been a violation of the rules of the Union for the carpenters to have returned to that particular job on August 22 or thereafter."

The Examiner found and the Board confirmed, (R. 27; 51):

> "There was no attempt to prevent Watson's employees from working on this or any other job. There was no picketing or any of the usual methods used to persuade employees not to work—*simply a concerted refusal to continue working with the non-union workers, in accordance with long established union precedent.*"

The Examiner found and the Board confirmed (R. 21, footnote 20; 51):

> "Henderson's testimony is also credited that in his capacity as business agent for the Union he was not asked at any time after August 21 by either Stanley or Parker to order the union carpenters to return to the Stanley job."

The Examiner found and the Board confirmed (R. 15; 51):

> "The Local admits to membership carpenters and other craftsmen including those who perform work

similar to that of Watson's installation employees. It has jurisdiction over member workmen in Chattanooga and the surrounding area."

The Examiner found and the Board confirmed (R. 19, footnote 15; 51):

> "Local 74 admitted to membership, and actually had members who did the type of installation work performed by Watson's workers."

Stanley testified on direct examination by the Board's counsel (R. 96):

> "I wanted Union men and had always enjoyed having Union men working, preferred them because I thought their work was better, and that Parker—*it was my understanding with Parker that Union men were going to do the work.*"

The Examiner found and the Board confirmed (R. 18; footnote 13; 51):

> "Pursuant to the terms of this agreement (made by Stanley with Parker on August 15, 1947), Parker hired the necessary workmen, including members of Local 74, to do the carpentry work, secured such material as was indicated, and proceeded to renovate and improve the building in accordance with the specifications. * * *
>
> "*Parker was a member of Local 74, and all the workmen, besides the carpenters employed by him on the job, were union men.*"

Stanley admitted that Parker's men "were doing their work satisfactory" (R. 103).

The Examiner found and the Board confirmed that Parker warned Stanley that there would be "complications" (with Parker's union employees) if Watson's non-union workmen were injected on the job (R. 18; 51).

Stanley admitted that in Watson's store Parker told him that his carpenters were members of Local 74 and that "the union men are not going to work with their (Watson's) men" (R. 92).

The Examiner found and the Board confirmed the finding (R. 19; 51):

> "Watson's insisted on installing the coverings it sold."

Yielding to this insistence by Watson's, and notwithstanding Parker's warnings, Stanley, on August 15, 1947, made with Watson a written contract, drawn by Watson's, whereby for one lump sum Watson's secured *the undivided right both to furnish the materials and to install them at Stanley's residence.* That contract read as follows (R. 90; Board's Ex. 3; R. 92-3):

> "We propose to furnish *and install* rubber tile and cove base in your kitchen and three bathrooms for the sum of $376, which includes sanding and removing old linoleum.
>
> "We will furnish *and install* chromite wall coverings in kitchen and two baths 4 ft. high for the sum of $400.
>
> "It will be necessary for the walls to be a good, smooth, dry plaster before *we apply wall covering.*
>
> "In case you decide to have the third bath included for wall coverings you may add $99 to above figures." (Italics ours.)

The Examiner found and the Board confirmed (R. 18; 51, 175):

> "The installation work (by Watson), estimated to take a week, was started on Sunday, August 17, when there were no other workmen present."

The Examiner found and the Board confirmed (R. 19; 51):

> "On Wednesday, August 20, two of the carpenters stopped work for about half an hour because of the presence on the job of non-union installation workers."

Speaking of the next day (Thursday, August 21), the Board's decision states (R. 55, footnote 11):

> "There were but two groups of employees then on the job: the carpenters and Watson's installation employees."

The Examiner found and the Board confirmed that the petitioner, Henderson, came to the Stanley job for the first time in the afternoon of that day (August 21); and that Henderson (R. 19, 51) "told the four union carpenters then working on the job that they could not continue to work with non-union" men.

Stanley testified that this occurred "around three o'clock" (R. 103-4); that in the presence of himself and Parker, Henderson immediately told the men to "pack up your tools and get off the job" (R. 95-6; 100); and that they at once "started" to do so (R. 103).

Henderson testified without any contradiction whatever that Local 74 and its members were at all times willing to install the floor and wall coverings purchased by Stanley from Watson's; and that they had previously installed Watson's coverings at other jobs (R. 133; 141).

B

On the Facts found, conceded and undisputed, the members of Local 74 had a lawful right to withdraw, and Local 74 had a lawful right to order their withdrawal, from the Stanley job.

Such was their right under both Common Law and Constitutional Law.

(1) Upon the foregoing facts, the freedom of the Union and its members could not be nullified by the provocative unit contract which Stanley made at Watson's insistence, whereby, after Stanley himself had set up the work at his residence as an exclusively union job (R. 96), he injected non-union men to replace union men on a portion of the job (see pp. 11-12, *supra*).

Under this Point, we need not discuss whether the withdrawal of the union men on August 21 was a primary, as distinct from a secondary, boycott. The category of "boycott" is really not the determinative consideration. The conceded facts establish both a common law and a constitutional right on the part of the union men and of Local 74 to do just what they did on August 21. The subject of "boycott" will be discussed in Point II, p. 33, *post*.

The Union and its members were not bound by any law, and could not constitutionally be bound by any law, to acquiesce in this subsequent subversion by Stanley of the 100 percent union job and of their employment as he himself had originally bargained for and set up the job and the employment (R. 96).

Section 8(b)(4)(A) was never intended to be wielded by an owner as a sword for the subversion of union employment which he himself had created.

Stanley had, in the face of full warning, created his own dilemma. From that dilemma he could not extricate himself by forcing servitude and breach of obligation and

union practice and rules upon union members or the Union itself.

It was Stanley himself who subsequently introduced and initiated the element of provocation and force. He had at the outset of the work employed a union contractor and stipulated for the employment of union men (R. 96). While both the union contractor and the union men were satisfactorily performing the work at his residence, he sought by stratagem and forcible introduction of non-union men, to compel the Union and its members to share their employment with non-union men in the very same rooms and on the very same work which they were competent and willing to perform.

At common law Stanley's own action gave the union men an absolute right to withdraw, and also gave Local 74, as their bargaining agent charged with the duty of protecting their and its rights, the absolute right to order them to withdraw.

(2) If, under these circumstances, Section 8(b)(4)(A) can be deemed to nullify such right on their part or on the part of their Union, it would clearly be unconstitutional.

A contrary holding would abridge freedom of speech and association, deprive the petitioners of liberty and property without due process of law, exercise a power not delegated to the United States by the Constitution, and impose involuntary servitude in a case where punishment for crime is not involved.

We live in a free society and under a Constitution which guarantees a free society.

There can be no freedom and no free society if men, in time of peace, can be compelled to work against their will, or to sell their labor contrary to their own wish or for purposes which they deem contrary to their own interests, or to continue with or resume an at-will employment where the nature and substance of that employment and the work-

ing conditions have, according to their judgment, been changed to their disadvantage. (*Hotel & Restaurant Employees* v. *Greenwood*, 30 So. (2d) 696; cert. denied 332 U. S. 847, January 5, 1948.)

The liberties guaranteed by the Bill of Rights have their origin and substance in the common law, and include personal liberties and not merely political liberty or property rights.

Outstanding is the declaration of the Supreme Court in *Hunt* v. *Crumboch*, 325 U. S. 821 that (p. 824):

> "They (workmen) can sell or not sell their labor as they please."

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, the Supreme Court said (p. 589):

> "The liberty mentioned in that Amendment (the Fourteenth) means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; *to live and work where he will;* to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." (Italics ours.)

The language of the Fourteenth Amendment as thus interpreted by the Supreme Court is identical with the corresponding language of the Fifth Amendment directed at the national government.

To the same effect are:

Meyer v. *Nebraska*, 262 U. S. 390, 399;
Lawton v. *Steele*, 152 U. S. 133, 137;
Truax v. *Raich*, 239 U. S. 33, 41;
Baker v. *Daly*, 15 Fed. 2d 881, 882.

The following general statement of the constitutional principle embodied in these decisions occurs in 11 *Am. Jur. Constitutional Law*, 346:

> *"The liberty to terminate employment contracts is fully protected as far as the employee is concerned.* An act which requires one to remain in the service of another whom he does not desire to serve is invalid because an employee cannot constitutionally be compelled to work against his will for any employer and is at liberty to refuse to continue to serve him." (Italics ours.)

In *Arthur* v. *Oakes*, 63 Fed. 310, the Court said (p. 317):

> "It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed under such constraint is in a condition of involuntary servitude—a condition which the supreme law of the land declares shall not exist within the United States or in any place subject to their jurisdiction."

In *Bailey* v. *Alabama*, 219 U. S. 219, the Supreme Court declared unconstitutional as violative of the Thirteenth Amendment, a state statute which made the refusal or failure to perform labor contracted for without refunding the money or paying for property received, *prima facie* evidence of the commission of a crime as defined by a section of the Act. The Court said (p. 244):

> "Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question (*Henderson* v. *Mayor*, 92 U. S. 268), and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid; an instrument of compulsion peculiarly effective as against the poor and

the ignorant, its most likely victims. There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based."

The Supreme Court also said, concerning the Thirteenth Amendment, page 241:

"* * * The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude."

(3) These constitutional guarantees necessarily guarantee the right of a union man to decline to work on the same job and cooperatively with non-union men, particularly where the work being done by the non-union men is part of the work for which the union men were themselves employed and part of the jurisdiction or craft of the union.

These constitutional guarantees also assure the right of unions to adopt working rules and practices such as the Examiner found here established "for many years" (R. 21).

As said in *Coppage* v. *Kansas*, 236 U. S. 1, pages 19-20:

"* * * Can it be doubted that a labor organization —a voluntary association of working men—has the inherent and constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with non-union men? Or that a union man has the constitutional right to decline proffered employment unless the employer will agree not to employ any non-union man? * * *"

In *Bossert* v. *Dhuy*, 221 N. Y. 342, the New York Court of Appeals said, pages 354-5:

> "It is unnecessary in the case now under consideration to hold that in all cases and under all circumstances, whatever a man may do alone he may do in combination with others, but it was clearly established in the National Protective Association case that workingmen may organize for purposes deemed beneficial to themselves and in that organized capacity may determine that their members shall not work with non-members or upon specified work or kinds of work.
>
> "It was not illegal, therefore, for the defendants to refuse to allow members of the Brotherhood to work in the plaintiffs' mill with non-union men. The same reasoning results in holding that the Brotherhood may by voluntary act refuse to allow its members to work in the erection of materials furnished by a non-union shop. Such action has relation to work to be performed by its members and directly affects them. The voluntary adoption of a rule not to work upon non-union made material and its enforcement differs only in degree from such voluntary rule and its enforcement in a particular case."

In *Stapleton* v. *Mitchell*, 60 Fed. Sup. 51, appeal dismissed, 326 U. S. 690, the Court held unconstitutional a Kansas statute which made it unlawful for an employee to "refuse to handle, install, use, or work on particular materials or equipment and supplies because not produced, processed, or delivered by members of a labor organization." The Court said (p. 61):

> "The right to peaceably strike or to participate in one, to work or refuse to work, and to choose the terms and conditions under which one will work, like the right to make a speech, are fundamental human liberties which the state may not condition or abridge in the absence of grave and immediate danger to the community."

In *Alabama State Federation of Labor* v. *McAdory*, 18 So. 2d 810, the Supreme Court of Alabama reviewed the constitutionality of Section 12 of an Alabama statute regulating labor unions. Section 12 made it unlawful for any employee to refuse to handle any work or materials, etc., because not produced or delivered by union members. The Court held this section of the Act unconstitutional on the ground "that it violates fundamental and basic civil rights as guaranteed under the Fourteenth Amendment."

(4) Moreover, the right to sell or not to sell one's labor or services is *not only a right of liberty but a right of property.* As a right of property it is equally protected by the constitutional guarantees.

Coppage v. *Kansas*, 236 U. S. 1, 14;
Adair v. *U. S.*, 208 U. S. 161, 173-175;
Bogni v. *Perotti*, 112 N. E. (Mass.) 853, 855;
State v. *Stewart*, 59 Vt. 273, 289.

C

Moreover, the right of the union men to withdraw, and the right of Local 74 to order a withdrawal, are recognized by the proviso at the end of Section 8(b)(4) and by Sections 7, 8(a), 13 and 502 of the Labor-Management Relations Act, 1947.

(1) The proviso at the end of Section 8(b)(4) reads:

> "*Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the the employees of such employer are engaged in a strike ratified or approved by a representative of such employee whom such employer is required to recognize under this Act."

Section 7 of the Act reads:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a) of the Act, so far as pertinent, reads:

"Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7,

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

Section 13 of the Act reads:

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications of that right."

Section 502 of the Act reads:

> "Sec. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

(2) If the withdrawal of the union men on August 21 from Stanley's premises be deemed "a strike" within the definition in Section 501 of the Act, then such strike must be deemed "ratified or approved" within the terms of the foregoing *proviso* at the end of Section 8(b)(4). The *Board's own case* shows that the petitioner Jack Henderson gave an order to withdraw on that day; that Henderson, as the Business Agent of Local 74, was the representative of its members employed on the Stanley job; that he approved the withdrawal, and, indeed, ordered it; and that the union men and Local 74 did not thereafter return to Stanley's premises, and were never asked to either by Stanley or by Parker. (See p. 13, *supra*.)

In consequence, when they refused to remain on the Stanley premises and did not return thereto, the statutory proviso above quoted exempted both them and the Local from the operation of Section 8(b)(4)(A), even assuming that otherwise it was or could be applicable.

(3) Legality was likewise established by Section 7 of the Act.

The union men on the Stanley job were on August 21, 1947 members of Local 74 which had been organized (to quote Section 7)

> **"to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."**

Under the common law, under constitutional law and under this Section 7, such "self-organization" for such purposes, and the right to engage in other "concerted activities" for the effectuation of such purposes, were lawful.

In aid of such purposes the Local and its members had the lawful right to adopt what the Examiner and the Board found to be the "long-standing rule of Local 74 not to permit its members to work on a job where non-union workers are employed"—a rule which the Examiner and the Board found to be "in accordance with long-established union precedent" (R. 27; 51). (See pp. 9-10, 16, *supra.*)

Obviously such a rule and purpose were vitally important, indeed essential, to any union, in order to strengthen its means to bargain collectively, and to furnish its members with "mutual aid or protection".

When Stanley contracted with Parker as a union contractor and member of Local 74 to do the work at his residence, and requested and stipulated that it be done with union men (R. 96), that contract necessarily recognized and implied assent to this familiar "long-standing rule" and well-known "long-established union precedent". Furthermore, by the very fact that it was negotiated and made as a union contract, it was in itself an act and result of collective bargaining and established the working conditions; and it recognized and adopted the union principle whereby the employment was under the shield of the

mutual aid and protection which union membership and the Local provided.

In consequence, when Stanley, while the work was in satisfactory progress, injected non-union men into the employment, he breached and subverted the whole union status of the job as established by the collective bargain which he himself had made (R. 96). Thereby he set in motion the right of the union employees by concerted action to stand together through their Local for "mutual aid or protection" in their employment. (See pp. 20, 27, *supra.*)

(4) Legality was also established by Section 8(a) of the Act.

Stanley's action in subverting the union employment which, he admitted (R. 96), he himself had requested and stipulated for, was a coercion of the union men and Local 74 to surrender some of the work to non-union men, to share some of the job and to work thereon with non-union men, and to disregard and treat as inapplicable to his job the long-established working rules of the Local and the "long-established union precedent" of organized labor, which were an essential part of union concerted action "for mutual aid or protection".

Thereby also, Stanley undertook "to dominate or interfere with the administration of" Local 74.

There is no contradiction of Parker's testimony that before signing the unit contract with Watson's for installation by Watson's non-union employees, Stanley said to Parker and to Watson's store manager (R. 139):

"To hell with the Union. I'll do as I please."

(5) Legality was also established by Section 13 of the Act.

That Section declares the basic purpose of the Act not "to interfere with or impede or diminish *in any way* the right to strike". The only exception is "except as specifically provided for herein".

No rule of statutory construction is better settled than that where a statute expresses a general recognition of a basic common law and constitutional right, such recognition must be construed broadly and in obedience to the presumption that the legislature intended no exemption from or subversion of such basic right beyond what is clearly and specifically expressed; and that, in consequence, any exception must be construed narrowly and guardedly.

Under this Act, before the right to strike can be deemed interfered with, impeded or diminished by the Act, there must be found in the Act clear language by which such limitation is "*specifically* provided for". The dictionary definition of "specifically" is "definitely", "explicitly".

(6) Legality was also established by Section 502 of the Act.

That Section opens with a broad and comprehensive exclusion,—"Nothing in this Act shall be construed to require", etc. The Act shall not be deemed to force any one "to render labor without his consent", or to make "the quitting of his labor an illegal act".

In the present instance the "long-standing rule of Local 74" against working on the same job with non-union men antedated the Act by decades, and was "in accordance with long established union precedent" throughout organized labor. (See pp. 9-10, 16, *supra.*)

When Stanley, in the face of warning as to this rule, provocatively subverted the agreed union status of the job at his residence, he had no right to be aggrieved by his own act in bringing the rule into operation, or to complain of the action of the Local and its members in quitting the job. Certainly, he had no right thereafter to require them to continue "to render labor" without their consent.

In giving the so-called order to withdraw, the petitioner Jack Henderson was acting merely as the voice of the rule,—as the mouthpiece of the "long established union precedent". He was performing a ministerial duty; and the men were performing their duty as members of the Local and were exercising their rights as free men.

While the union men were working at Stanley's residence under union conditions of employment pursuant to Stanley's union contract with Parker, they were there as members of Local 74 and under union conditions of employment as established by that Local's Working Rules. In their persons Local 74 was on the Stanley job,—on the Stanley premises. They were its representatives and members there. The Local was in no sense an outsider or stranger to the Stanley job or to the employment there. It was the "self-organization" of all its members,—the medium of their "concerted activities for mutual aid or protection",—their representative under a contract embodying the process and result of collective bargaining and the working conditions thereby established.

The withdrawal on August 21 was a collective act. Local 74 and its members went off the Stanley job and premises. This it and they had the right to do,—under the common law, under the United States Constitution, and under the Act itself.

POINT II

Even if, notwithstanding the considerations presented in the preceding Point, the term "boycott" could have relevancy, the facts found, conceded and undisputed establish a primary rather than a secondary boycott.

(1) Section 8(b)(4)(A) is understood to be directed against a so-called secondary boycott.

The accepted distinction between a primary and a secondary boycott is that the former runs primarily against the job struck by reason of some action or non-action of the employer or owner directly concerning the employment, whereas a secondary boycott merely makes a pawn of the employer for the purpose of coercing a third party who has no concern with the employment. A primary boycott may incidentally have repercussions as regards other employers or as regards third persons having dealings with the employer struck; but such is merely the inevitable indirect or incidental consequence of the primary conflict.

In a debate preceding the enactment of the Labor-Management Relations Act, 1947, Senator Taft said concerning Section 8(b)(4)(A) (93 Daily Congressional Record, p. 4323, April 29, 1947):

> "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees."

The facts found, conceded and undisputed as set forth in the preceding Point (p. 15, *supra*) demonstrate as a matter of law precisely what the Examiner found and the Board confirmed (R. 27; 51):

"There was no attempt to prevent Watson's employees from working on this or any other job. There was no picketing or any of the usual methods used to persuade employees not to work—*simply a concerted refusal to continue working with the non-union workers, in accordance with long-established union precedent.*"

In other words, the withdrawal of Local 74 and its members from the Stanley job on August 21 synchronized with and was the consequence of Stanley's injection of non-union men to take over from the union men a portion of the employment which Stanley himself had set up at his residence as a wholly union employment (R. 96). Thereby Stanley undertook to force the union men to share the job and to work side by side and cooperatively with non-union men.

There is not a particle of evidence that, if Stanley had not wrought and insisted upon this injection in the face of repeated warnings that the consequence would be just what it was, the withdrawal would have occurred at all.

There is not a particle of evidence that, if Stanley had not lent himself to the anti-union purpose of Watson's in refusing to sell the materials except as part of a unit contract which integrated with the sale installation by Watson's non-union men, any withdrawal would have happened at all.

On the contrary, Henderson testified without contradiction that the members of his Local had on other occasions installed materials bought from Watson's (R. 131, 141). (See p. 19, *supra*.) Both Stanley and Watson's knew this, because Stanley first endeavored to buy the materials and to turn them over to Parker for installation by the union men, in precise accordance with the terms of his contract with Parker which was the ordinary cost-plus contract covering both materials and labor (R. 86). But,

as the Examiner found and the Board confirmed (R. 18; 51, 56, 189):

> "Watson's insisted on installing the coverings it sold."

Stanley yielded to this pressure; signed the unit contract; and declared (R. 139): "The hell with the Union. I will do as I please."

Of course, by such a provocative action on Stanley's part in alliance with Watson's (or, if one prefers, on Watson's part in alliance with Stanley), and by Stanley's subversion of his own contract with Parker and of the one hundred percent union status of the employment as requested and bargained for by Stanley himself (R. 96), the Local and its members became entitled, indeed were driven, to defend the basic principle in organized labor that union men would not continue on a job where the employer later insisted on bringing in non-union men to share the work.

Hence, if the withdrawal can be called a "boycott" at all, it was primary. Its immediate cause and gravamen was Stanley's own act in impairing and subverting the union working conditions which he himself had established at his residence (R. 96).

(2) In the second place, when on August 15, 1947, Stanley yielded to Watson's insistence that it would not sell except on condition that it also install by its own non-union employees, Watson's and Stanley became allies as against the 100 percent union employment which by contract with Parker Stanley himself had already created at his residence (R. 96).

By that alliance, Stanley and Watson's made applicable to the Stanley job the "doctrine of enmeshed employment" which is expounded in *Douds* v. *Metropolitan Federation of Architects*, 75 Fed. Supp. 673 (Judge Rifkind).

In that case there was a strike against an engineering firm, called Ebasco. The purpose of the strike was to secure a better employment agreement. After the strike began, Ebasco transferred a large part of its remaining work and employees to another engineering firm, called Project, which had previously done sub-contracting work for Ebasco. Project was therefore also boycotted. Holding the boycott not to be secondary action, the court said that the words in Section 8(b)(4)(A) "doing business" were to be read "with the aid of the glossary provided by the law of secondary boycott"; and that (pp. 676-7)

> "To suggest that Project had no interest in the dispute between Ebasco and its employees is to look at the form and remain blind to substance. In every meaningful sense it had made itself party to the contest. Manifestly it was not an innocent bystander, nor a neutral. It was firmly allied to Ebasco and it was its conduct as ally of Ebasco which directly provoked the union's action.
>
> "* * * In encouraging a strike at Project the union was not extending its activity to a front remote from the immediate dispute but to one intimately and indeed inextricably united to it. See Bakery Drivers Local v. Wohl, 1942, 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178; cf. Carpenters Union v. Ritter's Cafe, 1942, 315 U. S. 722, 62 S. Ct. 807, 86 L. Ed. 1143."

In the present instance the Stanley residence was the place both of the established union employment, of the later injection thereon of non-union men by Watson's and Stanley as contracted allies, and of the consequent withdrawal of Local 74 and its members. After full warning and with intention aforethought, these allies jointly provided the *casus belli* at the job; and neither can be heard to claim that the resultant retirement of Local 74 and its members from the field on which the allies marched their

non-union men was otherwise than the sequence of cause and effect set in motion by themselves.

Whether or not, in view of Stanley's cost-plus contract with Parker for both materials and labor, Stanley and Watson's had the right to ally themselves to impair and invade that contract, the right of Local 74 and its members to take concerted action for mutual aid and protection and in observance of the essential working rule of organized labor, could not possibly be impaired, diminished or interfered with.

In *Denver Building Trades Council* v. *National Labor Relations Board*, 26 LRRM 2515, not yet officially reported, the United States Court of Appeals for the District of Columbia Circuit applied this doctrine of enmeshed employment and alliance to a case where the purpose of the picketing was to preserve the all-union character of the job by bringing the job to a standstill until non-union electricians brought on the job by a subcontractor were replaced. The court held that this union activity, termed a boycott, was a lawful primary strike and was not a secondary boycott in violation of Section 8(b)(4)(A). The court said that the union's action was "in protest against the employment there of the non-union electricians."

Precisely such was the withdrawal by Local 74 and its members from the Stanley job. It was a protest against, and occasioned by, the injection thereon of non-union men to usurp some of the employment on which the union men were engaged.

(3) In the third place, Section 8(b)(4)(A) is limited in its terms and effect to outlawing strikes where an object is to require any person "to cease doing business with any other person."

Obviously such a provision does not apply to a situation where, as in the building construction industry, there

is a general contract and a sub-contractor working on a single building project, and the labor stoppage is caused by anti-union action by the sub-contractor.

In *Mills* v. *United Association*, 83 Fed. Supp. 240, the court held that the relationship between a principal and a sub-contractor arising out of the awarding of a sub-contract was not a "doing business" between the parties within the meaning of Section 8(b)(4)(A). Said the court (p. 245):

> "The allegations of the complaint, which must be taken as true, state that the strike was called or engaged in because the employer was associated with or had contracted with an individual or a group who were obnoxious to the organized labor group. It is not a question of striking to force the employer to join any group; the absolute reverse is apparent from the pleadings. * * * As said by Judge Rifkind, in the Douds case, supra, it is my view that the words 'or to cease doing business with any other person' have reference to that which precedes it and must be construed in connection with the question of secondary boycott. It is simply another definition or a further spelling out of the definition of what is necessary to create a secondary boycott. It means 'doing business' as we ordinarily understand it between parties other than those to the particular contract or their allies. For that reason, it is my view that the complaint does not allege a cause of action under section 187, supra."

Thus the phrase "doing business" means business transactions which take place otherwise than between parties to a particular contract or between their allies in the matter of employment. This principle, applied to the present case, obviously excludes the withdrawal of Local 74 and its members on August 21 from classification as a violation of Section 8(b)(4)(A) and from classification as a secondary boycott.

Stanley had, as regards the installation involved, forced Watson's upon Parker as a sub-contractor or substitute. In either case, the refusal of Local 74 and its members to accept the anti-union joint action of Stanley and Watson's and to continue on the premises in face of the substitution, cannot be deemed within either the letter or the spirit of Section 8(b)(4)(A).

POINT III

The Finding by the Board, confirmed by the Court below, that on August 21 Stanley asked Henderson how the union men could be brought back and "Henderson suggested that Stanley cancel his contract with Watson as a means of getting the carpenters to return to work" (R. 57), in no way justifies either a finding or a conclusion that Henderson and the Local were guilty of an unfair labor practice under Section 8(b)(4)(A).

(1) The Board deduced from the foregoing finding that an object of the withdrawal was to force Stanley to cease doing business with Watson's (R. 54-5).

Aside from the fact that this testimony by Stanley was explicitly denied by Henderson, Parker, Rose, Stewart and Larkin, all of whom were present at the time (R. 151, 136-7, 154-5, 156), the legal fallacy behind the Board's finding and in the legal consequences which it draws therefrom lies in the over-simplification and in ignoring and even distorting the setting and the order of events as established by the admitted facts and other findings.

(2) After having admittedly requested and set up the work in his residence, including the installation of floor and wall coverings, as an exclusively union job by a union contractor who was a member of the Union, Stanley ad-

mittedly and deliberately made a unit contract with Watson's (a non-union employer) whereby Watson's, for a single lump sum, was *both "to furnish and install"* (R. 183),—and this in the face of admitted warnings that the union men would not continue in their work on the job if he thus transferred the installation of floor and wall coverings to non-union men employed by a non-union employer (R. 92, 100, 106, 139, 142).

The carrying out of that contract necessarily meant that Stanley was, by his own act, changing the 100% union job, which he had himself set up, to a partly non-union job whereby the installation was transferred from the union contractor and his union employees to a non-union contractor and to his non-union employees.

In consequence, even if Henderson *did* make the statement to which Stanley testified, *Henderson was right.* As long as *installation* remained an integrated part of the Watson contract, the Union and its members would not acquiesce in this subversion by Stanley of the 100% union job and of their union employment which he himself had originally set up and stipulated for.

Any consequence was an incident of Stanley's own act and object.

There is neither contradiction nor challenge of the testimony of Henderson and Parker that the Union and its members were at all times willing themselves to lay Watson's materials and had done so on other occasions (R. 133, 141).

Indeed, Watson's store manager himself confirms this testimony as to the union's willingness to lay Watson's materials, because he testified that Stanley at first tried to buy Watson's material *without* installation by Watson's men, but that in this instance Watson's refused to sell the material unless it also installed it by its own non-union men (86).

Watson's saw an opportunity to strike at the Local and to cause it to lose strength and jobs. Its store-execu-

tive, according to the uncontradicted testimony of Parker, said that "all in the world that we want is a chance" at the Local, and boasted to Stanley of the alluring prospect of recovering from the Local $60,000 in damages unless its members would submit to working with Watson's non-union men after the latter took over some of their employment (R. 139-40). Accordingly (to quote the finding of the Examiner, confirmed by the Board) (R. 18, 51):

> *"Watson's insisted on installing the coverings it sold."*

It is also highly probative of the ulterior purpose of Watson's that Mr. Smith, Watson's manager, professed before the Examiner to be unable to state how much in the contract price represented material and how much labor (R. 120); and also that he reluctantly admitted that as far back as "sixty days" prior to his testifying on October 24, 1947, Watson's regularly sold floor and wall coverings without insisting that its own employees install the same (R. 84-5).

Thus, the labor disruption at Stanley's residence was both *primary and direct* as between Stanley and the Union both in its origin and in its result. It was the consequence of Stanley's own subversion of the union men's working conditions at his residence. It was neither secondary nor a boycott of any merchandise whatever. The same result would have happened if non-union substitutes had been sent in from any other source. The consequence as regards Stanley's contract for installation by Watson's was created by Stanley himself and incidental to his own chosen object.

As long as Stanley's contract with Watson's *for installation* stood, the union men would not and could not continue on the job. If Stanley wanted the union men to stay on the job, then, as Henderson said, the *installation* must be by them and not by Watson's non-union men.

On the other hand, since Stanley had chosen *installation* by Watson's non-union men, the union men would withdraw.

In other words, the event on August 21 concerned not the material but the Working Rule, the original agreement for union employment and the crafts jurisdiction of Local 74 (R. 141).

It was Stanley who had introduced and initiated the agreed union status of the work at his residence; and as long as he insisted on maintaining subversion thereof, the union men could not return.

It was he who had first formed "an object",—an object adverse to the Union and to the union employment which he himself had contracted.

Obviously, Section 8(b) (4) (A) was never intended to be thus wielded by an owner *as a sword* for the subversion of union employment which he himself had created.

Since Watson had with purpose, and Stanley had by contract, created this act of aggression, how could the union or its members be expected—much less required—to continue with or return to the work in the face of the continued aggression thus enforced?

How, under the conceded circumstances and under the Act and the Federal Constitution, could the freedom of the union and its members be nullified by this provocative contract with Watson's?

The Examiner found and the Board confirmed (R. 21, 50) that Stanley continued to insist that the installation be carried on by Watson's non-union men; and the Examiner further found and the Board confirmed (R. 21, footnote 20; 50):

> "Henderson's testimony is also credited that in his capacity as business agent for the Union he was not asked at any time after August 21 by either Stanley or Parker to order the union carpenters to return to the Stanley job, but that if he had been so requested he could not have ordered the men to return without a special dispensation from Local 74."

POINT IV

Moreover, Section 8(b) (4) (A) was not in effect when the Union and the union men withdrew from the Stanley job on August 21, 1947, immediately following Stanley's injection of non-union men into their employment.

In consequence, the petitioners were not guilty of an unfair labor practice on August 22 when the Section took effect, in not thereupon rescinding the withdrawal and thus requiring the union men to return to the different, non-union and less advantageous employment and working conditions which Stanley had created several days before.

(1) This is not a case which can be argued as if Stanley had not, just before Section 8 of the Act took effect on August 22nd, converted what he himself had set up as a union job into a non-union job.

The Union and its members had accepted the employment at will in Stanley's residence because the employment was by a union contractor (a fellow member of their own Local 74) and because Stanley himself had asked Parker to employ union men to do the job (R. 18, footnote 13; 96). *It was a union job 100%* (R. 18, footnote 13).

But when on August 15, 1947, by contract with Watson's, Stanley took the laying of the wall and floor coverings from Parker and his union employees and transferred it to Watson's non-union employees, and on August 18 had caused the latter to take over the installation "during the regular working hours" (R. 18, 175), the entire base, extent and conditions of the employment of the union men became changed by Stanley's own act.

Hence, when Section 8 of the Act took effect on August 22nd any rescission by the petitioners of the decision

and concerted withdrawal of the day before (entirely lawful when made) would have required the union men and the Union itself to accept a relationship to the job and an employment and working conditions which were completely different from and less advantageous than what they had originally agreed to and what Stanley had originally set up and stipulated for (R. 96).

Hence, we respectfully submit, the Board and the Court below, in holding that the Petitioners were bound to rescind when Section 8 took effect, completely overlooked that thereby an employment relationship would have come into existence altogether different from that which had been originally agreed to by Stanley, Parker and the Union.

Certainly no provision of the Act condemns as an unfair labor practice any failure or refusal to create or accept new and less advantageous terms of employment, or new and less advantageous working conditions, or a transfer of current jobs from the union employees of the union contractor to the non-union employees of a non-union contractor.

When the union men quit on August 21 everyone understood that their quitting was as permanent as was Stanley's switch of the installation work to Watson's non-union men (R. 83, 95, 96-7, 103-4, 110, 124, 136-7, 152, 154). Indeed, the Examiner has found and the Board has confirmed, in accordance with undisputed testimony (R. 21, and footnote 20; 51):

> "On August 22nd Parker telephoned Watson's that the installation could be resumed. Two or three days later Watson's men returned to the job and completed their work about August 28. * * *
>
> "Henderson's testimony is also credited that in his capacity as business agent for the Union *he was not asked at any time after August 21 by either Stanley or Parker to order the union carpenters to return to the Stanley job.*" (Italics ours.)

(2) The decisions cited by the Board and the Court below have no parallelism in their facts.

If the petitioners had rescinded on August 22 or thereafter and the union men had been sent back to the Stanley job, the union and its members would have been accepting fewer jobs, less work and less advantageous terms of employment and working conditions than they, Stanley and Parker had agreed upon when the work was first undertaken in the early part of August.

There are no such determinate facts in any of the cases cited by the General Counsel or the Court below. In all those cases the so-called strike was for better terms,—not because the existing agreed terms had been withdrawn, breached or subverted by the owner.

(3) Moreover, there is no provision in the Labor-Management Relations Act, 1947 which, in the face of Stanley's own action just before Section 8 took effect, laid any such compulsion on either the petitioners or the union men, or required submission to any such subversion of the original employment.

In his decision in this matter, denying the General Counsel a preliminary injunction, Judge Darr had said (74 F. Supp. 499, 501):

> "Certain it is that the Act is prospective in its intentions. * * * These words (Section 8(b) (4) (A)) appear to clearly indicate the affirmative action in striking or failing to perform services and not a continuation of a condition that was lawfully set up prior to the enactment of the Act. * * * I have concluded that this is not a case under the Act."

This judicial language is the more applicable since if the Act does not extend to "a continuation of a condition that was lawfully set up prior to the enactment of the Act", then *a fortiori* it does not project the requirement of future acceptance of terms, extent and nature of employment less advantageous than had been lawfully set up prior to the enactment of the Act.

As said by this Court in *Shwab* v. *Doyle*, 258 U. S. 529, 534:

> "The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. 1 Kent. 455; *Eidman* v. *Martinez*, 184 U. S. 578; *White* v. *United States*, 191 U. S. 545; *Gould* v. *Gould*, 245 U. S. 151; Story, Const., §1398. The comment of Story is, 'retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.'"

See also *White* v. *United States*, 191 U. S. 545, 552.

(4) Moreover, in the cases cited by the General Counsel, the owner had not created new and adverse labor relationships shortly before the Act took effect.

They were all cases where there had been a prior refusal to grant or to bargain over demands for better wages or working conditions, and where, after the Act took effect, there were *overt affirmative acts* for the purpose of additional pressures to obtain such betterments. (See, for example, *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. 2d 134, 139.)

In the present case, there is neither claim nor proof that after August 21, 1947, the petitioners or the members of the Local took any overt or affirmative action whatever on or against the job at the Stanley residence, or even picketed it or threatened to picket it. The Examiner and the Board expressly found that there were no such overt acts (R. 27, 51, 58, 59).

(5) Since Stanley, with the cooperation of Watson's, had chosen to terminate the old and agreed conditions before Section 8 took effect, he could not thereafter invoke Section 8 to bring about an enforced acceptance of the new conditions which he had chosen to substitute.

POINT V

Should Section 8(b) (4) (A) be so interpreted and applied as to have required the Petitioners on August 22nd to "rescind" the so-called "Order" of August 21st and thus require the union men to return to the lesser employment under non-union conditions substituted by Stanley, such an interpretation and application of the Section would violate the First, Fifth, Tenth and Thirteenth Amendments to the Constitution of the United States.

(1) On uncontradicted testimony the Examiner found and the Board confirmed that the traditional union practice and this Union's Working Rule against sharing a job with non-union men had been in force and observed "for many years"; that Henderson's so-called "order" was in obedience to it; that the withdrawal on August 21 had been "in accordance with long established union precedent"; and that the return of the union men on August 22 "would have been a violation of the rules of the Union" (R. 21, 27, 51, 59).

The Board's own Brief in the court below conceded that "it would have been a violation of petitioner union's rules for the carpenters to have returned to the Stanley job on August 22 or thereafter" (p. 8).

Observance on August 21 of that traditional union practice and of this Working Rule was, it is undisputed, wholly lawful. How then, constitutionally speaking, could its continued observance on August 22 become *ex post facto* unlawful?

This Working Rule was lawful when made. It had been given sanction and obligation by the United Brotherhood itself (Respondents' Ex. 3, Section 7, p. 4). Similar rules, as the decisions of the courts show, are familiar and long-standing tenets of Organized Labor. Without such rules

and practice Organized Labor could easily be disrupted by its enemies and by non-union labor.

Furthermore, this traditional practice and this Working Rule constituted a lawful part of the mutual *contract* between the members of the Local, *and a lawful part of the agreement with Stanley* when he requested of Parker that all employees on the job be, like Parker himself, union men (R. 96).

The officers of the Local were merely the agreed spokesmen and representatives of the members for the observance of this essential union practice and of the agreed working conditions. For that purpose Henderson was acting merely as the agent of all the Local's members, both on and off the Stanley job.

(2) Lawful observance of the agreed working conditions set up by Stanley himself (R. 96) and of the traditional practice and the Working Rule, once begun, could not be outlawed and the opposite rendered directly or indirectly compulsory by subsequently effective legislation.

Such subsequent legislative requirement or coercion would violate the First, Fifth, Tenth and Thirteenth Amendments to the Constitution of the United States.

It would abridge freedom of speech, deprive the petitioners of liberty and property without due process of law, exercise a power not delegated to the United States by the Constitution, and impose involuntary servitude in a case where punishment for crime is not involved.

See the decisions cited and discussed under Point I, Subd. B, pages 20-6, *supra*.

POINT VI

The Court below erred in holding that the Board had jurisdiction.

The brief construction job in Stanley's private residence was so essentially local, separate and transitory as not to fall within the interstate commerce clause, and hence not within the Labor-Management Relations Act, 1947.

The predicates implicit in the General Counsel's argument and the decision below, as applied to the facts of this case, would endanger our federal system and trade unionism, would wipe out the distinction between interstate and intrastate commerce, and would bring the entire building industry, however local the construction, under federal control and under the Taft-Hartley Act.

Not only was the Stanley matter purely local, but it all took place and was over, and all the improvements in his house were completed, within a week (R. 18-19, 20, 56).

It was as transient as it was local, and fully justifies our respectful opinion that if ever there was a tempest blown up in a local teacup, this proceeding is it.

A

Constitution of the United States—Article I, Section 8(3)

"The Congress shall have Power—* * *

"*Regulation of Commerce.*—3. To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."

Labor-Management Relations Act, 1947—Sec. 2 (6)

When used in this subchapter—

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign conntry.

(29 U. S. C. Sec. 152 (6))

Labor-Management Relations Act, 1947—Sec. 2 (7)

When used in this subchapter—

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(29 U. S. C. Sec. 152 (7))

B

Senator Taft

There are many authoritative voices that the Act has, and can have, no general application to a local construction job or to a local building union performing a local job. *A fortiori*, it can have no application to the installing of imitation tile in Stanley's home in Chattanooga.

In the New York Journal-American of July 7, 1947, *Senator Taft*, in a signed statement under the heading "Sen. Taft Explains New Labor Act," made the following answer to the following question:

> "52—Q. Will this prevent jurisdictional strikes in the construction industry?
>
> "A. The construction industry ordinarily would be intrastate commerce and would not be affected by the Act. Of course, there are instances where it is interstate commerce, and in such cases the employer can obtain a decision from the National Labor Relations Board settling the jurisdictional dispute."

In *Colliers Magazine* for March 6, 1948 (Volume 121, No. 10) *Senator Taft* reported on the first few months of the Act's operation. In an article entitled, "Toward Peace in Labor", he said at page 39:

> "I might say, however, that I don't think Congress intended that this provision (closed shop) extend to local building-trade unions whose work is, in fact, *intrastate* in character. The status of such unions ought to be left to the State Law." (Parenthesis and italics ours.)

C

Decisions by this Court

Levering & Garrigues Co. v. *Morrin*, 289 U. S. 103, 107, is a conclusive authority *a fortiori*. It involved a suit to enjoin the defendant union and employer association from compelling or conspiring to compel the petitioners to employ in their work of fabricating and erecting structural steel and iron only members of the labor union. The Supreme Court, in dismissing the complaint, said (p. 107):

"Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. *Use of the materials was purely a local matter*, and the suppression thereof the result of the pursuit of a purely local aim." (Italics ours.)

The opinion in this *Levering* case cited as authority the case of *Industrial Assn.* v. *United States*, 268 U. S. 64. That case involved a combination on the part of building contractors and others, to establish the open shop plan of employing labor, by requiring builders who desired materials of certain kinds to obtain permits from a builders exchange, and by refusing such permits to those who did not support the plan. The Court, in holding that any resultant interference with the free movement of materials from other states was incidental, indirect and remote and hence was not an unlawful interference with interstate commerce, said (p. 82):

"The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation—*for building is as essentially local* as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act." (Italics ours.)

In *Anderson* v. *Shipowners Assn.*, 272 U. S. 361, the Court, in holding that the facts showed that the alleged combination was in violation of the Sherman Act, nevertheless stated in relation to local business (p. 363):

"Nor is building commerce; and the fact that the materials to be used are shipped in from other states does not make building a part of such interstate commerce." (Italics ours.)

D

Decisions by Other Courts

There are many decisions to the same effect.

Mere local construction, original and transitory, such as was occurring within Stanley's private residence has always been judicially regarded as an intrastate activity. Otherwise, and if laying a little wall and flooring covering in several rooms in a single home can be drawn within the federal orbit, it is scarcely possible to conceive of any local business which would be exempt from the jurisdiction of the National Labor Relations Board.

The mere fact that some of the materials bought for the purpose of such a job may have been purchased from a local stock which in turn had been built up partly from a source in another state, does not confer jurisdiction on the National Labor Relations Board or other federal agency deriving its authority from the interstate commerce clause.

Murphy et al. v. *Reed et al.*, 335 U. S. 865;
McDaniel v. *Brown & Root, Inc.*, 172 F. 2d 466, 471 (C. C. A. 10);
Kelly v. *Ford, Bacon & Davis*, 162 F. 2d 555, 561 (C. C. A. 3);
Mills v. *United Ass'n of Journeymen*, 83 F. Supp. 240, 246;
Barbe v. *Cummins Construction Co.*, 49 F. Supp. 168, 171;
Scott v. *Ford, Bacon & Davis*, 55 F. Supp. 982, 984.

In addition to the above, there are many cases holding that local conduct will be insulated from the operation of the Sherman Act and other federal laws as to

interstate commerce on the basis of the purely local aims and actions.

Albrecht v. *Kinsella*, 119 F. 2d 1003, 1005;
United Leathers v. *Herkert*, 265 U. S. 457;
United Mine Workers v. *Coronado*, 259 U. S. 344;
Pedersen v. *D. L. & W. R. R. Co.*, 229 U. S. 146;
Raymond v. *Chic., Milw. & St. Paul R'way Co.*, 243 U. S. 43;
Oregon Short Line R. Co. v. *Gubler*, 9 F. 2d, 494.

Thus, in the *Raymond* case, *supra*, it was held that the plaintiff, who was injured while laboring in the construction of a new tunnel for his employer (a railroad actually operating as an interstate carrier) was not engaged in interstate commerce and that the railroad was also, as regards the construction of the tunnel, not engaged in interstate commerce.

E

The line between Interstate and Intrastate Commerce

It is inconceivable that Congress intended to attempt to wipe out the constitutional distinctions between intrastate and interstate commerce, or to extend the federal control over local activities having only a speculative, indirect, incidental or collateral effect on interstate commerce.

All intrastate commerce can theoretically have some remote consequence as regards interstate commerce. Nevertheless, the courts have been alert to hold that our constitutional system of delegated powers requires that the federal power can extend to local transactions only when their effect on interstate commerce is direct and immediate.

In *Schechter Corp.* v. *U. S.*, 295 U. S. 495, the Court said (p. 546):

> "But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control."

The reasoning in the *Schechter* opinion was followed by the Supreme Court in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, where the Court said (p. 309):

> "The federal regulatory power ceases when interstate commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins. There is no basis in law or reason for applying different rules to the two situations. * * * A reading of the entire opinion (in the *Schechter* case) makes clear, what we now declare, that the want of power on the part of the federal government is the same whether the wages, hours of service, and working conditions, and the bargaining about them, are related to production before interstate commerce has begun, or to sale and distribution after it has ended."

The same principle is stated in *Kidd* v. *Pearson*, 128 U. S. 1, 20, and in the qualifying language in *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, at page 37.

F

The Decision quoted by the Court Below

The only decision from which, on this issue of law, the court below quotes (R. 190-1) is *National Labor Relations Board* v. *J. L. Hudson Co.*, 135 F. 2d 380 (C. C. A. 6), certiorari denied 320 U. S. 740.

There, we submit, the facts and the situation and relationship of the parties bear no relation to the present instance. In that case, the party accused by the Board of unfair labor practice was the employer and was engaged directly and immediately in interstate commerce both as a purchaser and a seller. It was "an enormous retail department store in Detroit, Michigan" which annually purchased $35,000,000 worth of salable merchandise from points outside of Michigan and sold and shipped merchandise to the extent of about $1,400,000 to customers outside the State of Michigan. It spent about $250,000 on advertising in states other than Michigan. It had thirty-six active trademarks registered in its name in the United States Patent Office.

The complete difference between that case and the present is obvious. In the present case, the parties charged with unfair labor practice are a small local union in Chattanooga and a single individual who resides in Chattanooga and was that Local's business agent. Neither the Local nor its business agent was engaged in any interstate commerce whatever. No such claim is even made. The work being done was purely local, and consisted exclusively of a small amount of construction work in a few rooms in Stanley's private residence. The employees engaged thereon were purely transitory and were employed at will and solely for this job. This employment, set up by Stanley himself as a 100% union job, was subsequently subverted by him when he sought to transfer the installation work being done by the union men to non-union men employed

by an employer other than Parker. That purely local act of Stanley's precipitated the event.

In consequence, when, in the *Hudson* case, the Court of Appeals for the Sixth Circuit said that the Board had jurisdiction because the activities of the accused department store were "interstate commerce in such close and intimate fashion" (135 F. 2d 380, 382), it was using this language with reference to an accused which was itself a vast purchaser and seller directly through the channels of interstate commerce,— thus bearing no comparison whatever to the individual and the small local accused in the present case, engaged in no interstate commerce at all.

G

The former General Counsel's interpretation

Although in his brief below the General Counsel argued that, notwithstanding that the building activity here was local and in a private residence, nevertheless such activity may reach interstate commerce, if multiplied by frequent instances. For example, the General Counsel stated on page 23 of his brief below:

> "This is not to say that the impact on commerce resulting from respondents' activities on the Stanley job would in itself be substantial but the threatened effect on commerce is not measured solely in terms of that single project."

This argument, as applied to the facts of this case, is, we submit, (1) purely hypothetical and speculative, (2) highly dangerous and fallacious in its constitutional implications, and (3) repugnant to authoritative judicial decisions dealing with comparable facts. Moreover, there was no proof whatever of similar instances. The Stanley affair was unique, for it was he who, after setting up the job as a union job imposed non-union conditions.

There is not a particle of evidence that the Local ever did or ever would refuse to install Watson's materials by its own members. The uncontradicted and unchallenged testimony was that the union men would willingly have installed it (R. 133, 141).

There is neither claim nor evidence that the Petitioners ever picketed the Stanley residence, or threatened to do so, or solicited any of Watson's employees at that job not to work there.

Furthermore, the Examiner himself has expressly found that all picketing at Watson's store, begun before the Stanley job, was discontinued by August 28, 1947 (R. 16). There could be no clearer proof that even that lawful activity had promptly ceased to have any aspect or promise of continuance. There is not a particle of evidence that its resumption was contemplated or has ever occurred.

Also the Examiner has found that Watson's materials were all laid by August 28, and the entire job at Stanley's residence completed by August 31 (R. 20).

The momentary tempest in a teacup, stirred by Stanley's act in injecting non-union working conditions after setting up the job as a union job, had blown itself out.

The Courts have rejected reasoning so subverting of settled principles essential to our Federal system, as that sought to be applied by the General Counsel to the facts of this case.

Thus, in the *Schechter* case, 295 U. S. 495, the Supreme Court said (p. 554):

> "Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. *Cf. Chicago Board of Trade* v. *Olsen*, 262 U. S. 1. There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion

of the forces that oppose and counteract them, there will be an end to our federal system."

In *Santa Cruz Fruit Packing Co.* v. *NLRB*, 303 U. S. 453, the Supreme Court said (p. 466):

> "It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection."

The General Counsel has cited:

NLRB v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1;
Polish National Alliance v. *NLRB*, 322 U. S. 643;
Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U. S. 219;
United Brotherhood v. *Sperry*, 170 F. 2d 863 (C. C. A. 10).

The *Jones & Laughlin* case, *supra*, cited by the General Counsel, upheld the constitutionality of the National Labor Relations Act by which the Congress exercised the federal power to protect the general field of interstate commerce from disruptions through industrial strife. The opinion has, in our judgment, relevancy to the present case *only* because of the following two sentences therein (301 U. S. 1, 30, 31):

> "The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of

commerce is vital to the maintenance of our federal system."

"There can be no question that the commerce thus contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce *in the constitutional sense.*" (Italics ours.)

The *Polish National Alliance* case, *supra* (322 U. S. 643), cited by the General Counsel, can have no conceivable application. There the Polish National Alliance, which the National Labor Relations Board had found guilty of unfair labor practices, conducted a nationwide business, playing an insurance, lending, investing and credit role "in interstate industries, railroads, and other public utilities", and conducting financial transactions across state lines in such wise as inevitably to affect "to an extent not negligible the interstate enterprises in which the large assets of Alliance are invested" (pp. 645-6).

The *Mandeville Island Farms* case, *supra* (334 U. S. 219), cited by the General Counsel, was an instance where the defendant was sued for a nationwide conspiracy in violation of the Sherman Act. The Supreme Court upheld the sufficiency of the complaint which alleged both monopoly and price fixing. The Court merely held the obvious, to wit: that the monopolization of all local business, when achieved by restraining interstate commerce, is condemned by the Sherman Act (pp. 235-6).

The *United Brotherhood* case, *supra* (170 F. 2nd 863), cited by the General Counsel, was not local at all. There, in the course of a strike against an employer shipping prefabricated houses throughout the United States, a secondary strike was instituted against a purchaser of such houses in the very act of shipment across State lines.

The General Counsel also attempts to erase, or at least blur, the distinction as applied to this case between intrastate and interstate commerce, by citing statements from the Senate Report on the Taft-Hartley Act and statements made by individuals in the debates in Congress.

We think that the foregoing statements by Senator Taft, the chief author and draftsman of the Act, are an adequate answer to this attempt.

H

The Subsequent Cleavage between the former General Counsel and the Board as to the Application of the Act to Small Local Construction

As far as we can ascertain, the present case was the first, involving local temporary construction in *a private residence*, to come before the Board. The Board accepted jurisdiction, with a reluctant concurring opinion by the Chairman and an outright dissent by member Houston (R. 60, 61).

Thereafter, in several cases, the Board refused to take jurisdiction and dismissed cases concerning *companies in the building construction industry* on the very ground that their business was primarily local and insubstantial.

These cases are:

Walter J. Mentzer, 82 N. L. R. B. No. 39;
Petredis & Fryer, 85 N. L. R. B. No. 45;
Row Construction Co., 88 N. L. R. B. No. 132;
B. W. Fellers Co., 88 N. L. R. B. No. 212.

In the *Mentzer* case (unofficially reported at 23 LRRM 1570), the facts show that the respondent was a plasterer contractor who purchased material from outside the state. The General Counsel argued that the facts in this case established the importance of the small establishment in

the construction industry, and required that this type of business be brought under the Act.

The Board, however, stated that in numerous cases involving aspects of the building construction industry, they have refrained from accepting jurisdiction. In refusing to accept jurisdiction in that case, the Board stated:

> "Accepting the General Counsel's offer as proved, we nevertheless find that the operations of Respondent Mentzer, a small contractor, *are essentially local in character,* and that their interruption by a labor dispute could, at most, have only very remote and insubstantial effect on commerce. Nor does Mentzer's status as a building contractor dictate a different conclusion." (Italics ours.)

In concurring, Chairman Herzog stated:

> "This building construction operation is both local and insubstantial. Although its local attributes seem to me no more conspicuous than those present in the *Watson* case, where we exercised jurisdiction, a different result is permissible and warranted here because the section of the Act involved has a different legislative history."

In the *Petredis & Fryer* case (unofficially reported at 23 LRRM 1395), the Board declined to take jurisdiction even though there was a secondary boycott and a general local contractor who was engaged in the construction of a theatre was the charging party. The Board stated:

> "On the basic jurisdictional facts * * * this case involves at the very most an impact on commerce no greater and no less remote than that present in the recent Mentzer case (*Matter of Walter J. Mentzer,* 82 NLRB #39), in which a majority of the Board declined to accept jurisdiction."

In *Row Construction Company* (unofficially reported at 25 LRRM 1362), the Board held that the intention of the National Labor Relations Act would not be effectuated by asserting jurisdiction over a complaint where the employer's operations were limited to the construction of small municipal buildings. The Board, in rejecting the arguments of the General Counsel that jurisdiction should be asserted, stated:

> "The General Counsel in fact concedes that the business of Row, standing alone, is so small that the Board, should it follow certain precedents, would not exercise jurisdiction herein. (See *Petredis & Fryer*, 85 NLRB No. 45, [24 LRRM 2395], and cases cited therein). But, according to the General Counsel, there are reasons why jurisdiction should be asserted here. First, that the general contracting industry is a multi-million dollar industry, conducted primarily by small units which constitute, in the aggregate, a vast volume of interstate commerce; that nearly 50 percent of all general contracting within Southern California is performed by contractors with 3 or less employees; and that the fact that Row's 'own contribution to the demand for construction products may be small in volume is not enough to remove him from the scope of Federal regulation * * *' A similar argument was advanced before the Board in the *Mentzer* case, and disposed of adversely to the General Counsel. (*Walter J. Mentzer*, 82 NLRB 389 [23 LRRM 1570]). Second, that if jurisdiction exists in this proceeding, the Board must exercise it, that discretion does not lie within the Board to dismiss a complaint solely because it believes that to assert jurisdiction would not effectuate the policies of the Act, and that the question whether jurisdiction should be asserted in any case is for determination exclusively by the General Counsel. This proposition too has been considered by the Board, and decided adversely to the General Counsel. (*Haleston Drug Stores, Inc.*, 86 NLRB No. 125 [25 LRRM 1040]).

In *B. W. Fellers, Inc.* (unofficially reported at 25 LRRM 1473), the Board declined to assert jurisdiction in a complaint proceeding where the employer was a local general contractor engaged primarily in residential construction. This ruling was based by the Board on the *Petredis & Fryer* and *Mentzer* cases noted above.

These decisions by the Board, rendered after its decision in the present case, show that:

1. The Board has become alive to the fact that, if the Taft-Hartley Act is extended to local temporary construction in a private residence or a like building, there is no limit to the extension of that Act over the entire economy and business of the nation.

2. In this, the initial, case before it involving small, local, temporary construction in a single building, the Board had at first adopted, but has now abandoned, the view stated herein by the Chairman that: "The General Counsel having seen fit to prosecute this case, I believe that the Board is under a duty to complete the task by asserting jurisdiction" (R. 62).

Obviously, as the above later cases show, the Board has now determined that there is no such "duty" to follow the General Counsel in his almost unlimited interpretation of the application of the Taft-Hartley Act, and has further determined that the meaning and policy of that Act is far more restricted in the field of purely local construction, even where such construction is not for a private owner but for a company or contractor engaged in the construction business.

As is well known, this cleavage in interpretation, which has come into the open between the General Counsel and the Board, has been considered and made the subject of authoritative pronouncements by Committees of Congress.

I

Pronouncements by Committees of Congress against the former General Counsel's interpretation of the Taft-Hartley Act

In early 1948 joint sub-committees of the House Committee on Expenditures in the Executive Departments and of the House Committee on Education and Labor were created to investigate the scope of the disquieting interpretation by the General Counsel of the NLRB of the term "affecting commerce" as used in the Taft-Hartley Act. These sub-committees made a unanimous Report on May 26, 1948 (80 Congress, 2nd Session, House Report No. 2050) which was thereupon approved and adopted by the full Committee on Expenditures without a dissenting vote. This Report disclosed that the General Counsel, Mr. Denham, had officially stated that (pp. 5, 6):

> "The present thought of the Board * * * is that it is a rare case in which business does not affect commerce in some degree and that where commerce is affected the Board has jurisdiction. * * * I can conceive of very few businesses over which there is not at least technical jurisdiction."

The sub-committee noted that, since the jurisdiction section of the Taft-Hartley Act had been taken verbatim from the Wagner Act, Congress did not intend to enlarge the scope of jurisdiction under the new Act. In its findings the sub-committee stated (p. 5 of House Report 2050):

> "Your subcommittee is certain that it was not the intention of Congress to include in the jurisdiction of the National Labor Relations Board every small, local business which drew a small portion of its supplies or merchandise from beyond the borders of a State or Territory. * * *

"The subcommittee is of the opinion that this new interpretation proposed by the general counsel of the Board to be placed upon the term 'affecting commerce' is not warranted either by the previous history of interpretation and administration of the Wagner Act, by the debates on the bill or by the terms of the Act itself; that such interpretation is not necessary to effectuate the purposes of the act.

"The subcommittee looks upon this proposed interpretation as an attempt, by administrative interpretation, to give the country administrative law in the place and stead of law enacted by the Congress. * * * Our national history does not afford a more striking example of bureaucratic aggrandizement."

This Report was thereupon approved by the whole Committee on Expenditures, without dissenting vote, and forwarded to the Speaker.

POINT VII

In any event, on August 22, 1947, and thereafter, there was, as a matter of law, (1) no justification for "A Cease and Desist Order"; and (2) no justification for not applying the *de minimis* principle.

(1) The testimony is all unanimous, and the Examiner and the Board so found, that the entire work at Stanley's residence (including the installation of Watson's materials) was completed within a few days, to-wit by August 28 (R. 20, 56).

The Examiner and the Board held that the picketing of Watson's store, discontinued by August 28, 1947, was not an unfair labor practice (R. 16, 25, 59).

Watson's filed no charge until August 29. Its amended charge was filed September 15 (R. 173).

The Examiner expressly found, and the Board confirmed the finding (R. 27, 50, 59), that:

> "There was no attempt (by the Petitioners) to prevent Watson's employees from working on this or any other job. There was no picketing or any of the usual methods used to persuade employees not to work—simply a concerted refusal to continue working with the non-union workers, in accordance with long established union precedent." (Parenthesis supplied.)

The Examiner also expressly found, and the Board confirmed the finding (R. 21, footnote 20; 51, 59):

> "Henderson's testimony is also credited that in his capacity as business agent for the Union he was not asked at any time after August 21 by either Stanley or Parker to order the union carpenters to return to the Stanley job."

There was no proof, evidence or claim of any overt or affirmative action of any kind against Stanley's job or Watson's men employed there after August 21, 1947. There never was any picketing of the Stanley job. There is no claim that there was even a threat to picket it.

Hence, there was no more justification for the issuance of an administrative injunction order by the Board than, as Judge Darr held, there was for the issuance of an injunction order by the Court.

(2) Injunction orders, whether or not couched in terms of "cease and desist", cannot lawfully be issued merely as exhortation, or as advice, or on suspicion, or as a punishment, or where, as Judge Darr ruled, the case is "moot" (74 F. Supp. 499, 502).

Thus, in *Walling, Administrator of Wage and Hour Division* v. *Livrenois*, 50 F. Supp. 978, the Court said (p. 980):

"We do not believe in government by injunction to begin with nor do we believe that there is evidence of prospective further violation if this defendant returns to the business of manufacturing bricks. Where such a probability does not exist there is no need of an injunction. *Fleming* v. *Phipps*, D.C., 35 F. Supp. 627; *Fleming* v. *National Bank of Commerce of Charleston*, D.C., 41 F. Supp. 833; *Walling* v. *Woodruff*, D.C., 49 F. Supp. 52; *Walling* v. *Builders' Veneer & Woodwork Co.*, D.C., 45 F. Supp. 808."

In *Walling* v. *Nashville, Chattanooga & St. Louis Ry.*, 60 F. Supp. 1004, the Court said (p. 1008):

"So even if they are 'employees', which the court holds that they are not, there is no necessity for an injunction, the purpose of an injunction being to prevent future violations, not to punish past violations."

This decision was affirmed by the Supreme Court of the United States in 330 U. S. 158.

To the same effect is *Walling Administrator of Wage and Hour Division* v. *Todd*, 52 F. Supp. 62, 65.

(3) Moreover, the Chairman of the Board has referred to this controversy as one *"so local and so diminutive"* (R. 62); and such was the ground of the dissent in the Board (R. 63).

It is a very familiar principle that the law "is not concerned with trifles", and that restraining orders will not be issued against them. *De minimis lex non curat.*

Reuter v. *Walling*, 137 F. (2d) 315, 319 (C. C. A. 5);

Virginia Electric & Power Co. v. *National Labor Relations Board*, 115 F. (2d) 414, 422-3 (C. C. A. 4); reversed on other grounds 314 U. S. 469.

In *Groneman* v. *International Brotherhood of Electrical Workers*, 177 F. 2d 995 (C. C. A. 10), decided November 4, 1949, the charge was a secondary boycott and illegal picketing by the defendants. Certain union carpenters had left a construction job *for nine days*, thereby delaying the completion of the job for that brief period. Although the charge was that the objective of the strike was a secondary boycott, the suit for damages under Section 303 (b) of the Labor-Management Act of 1947 was dismissed for the reason that the effect of such brief construction delay upon interstate commerce was so slight as to fall within "the *de minimis* doctrine."

CONCLUSION

The decree of the United States Court of Appeals should be reversed, and the petition for enforcement should be dismissed.

Dated, February 2, 1951.

Respectfully submitted,

CHARLES H. TUTTLE,
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DANIEL F. O'CONNELL,
Attorneys and Counsel for Petitioners.

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IN THE

Supreme Court of the United States

October Term, 1950

No. 85

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. of L., and JACK HENDERSON, Individually and as Agent for Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L.,
Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF FOR LOCAL 74 AND JACK HENDERSON, PETITIONERS

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SUBJECT INDEX

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POINT I.—Since the Board heretofore conceded that this case "poses the question" whether the Local's withdrawal of its members "because" Stanley injected non-union labor, was a violation of Section 8 (b) (4) (A) of the Act, we are surprised by the Board's brief which apparently now argues that such question is not posed, and that the withdrawal was "because" of another object 1

POINT II.—"The question" which, as stated in the Board's Supplemental Memorandum, this case "poses", is inherent in the findings 3

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POINT V.—The Board's brief is, we submit, in error in its claim that the employment, as Parker and Stanley set it up, was not an employment under all-union working conditions, and was not subject to the rules of the Union, and, as between Parker or Stanley on the one side and the Union on the other, did not represent collective bargaining 7

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POINT VI.—Finally, the Board's brief contends that "an object of the strike was to force Stanley to cease doing business with Watson's", and that in consequence it violated Section 8 (b) (4) (A), irrespective of the compulsory obligation of the Local's working rules, and irrespective of the provocative act of Watson's and Stanley in injecting non-union men into the Union employment, and irrespective of the finding that the withdrawal was "simply a concerted refusal to continue working with the non-union workers, in accordance with long established union precedent" (R. 27; 51) 12

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POINT I

Since the Board heretofore conceded that this case "poses the question" whether the Local's withdrawal of its members "because" Stanley injected non-union labor, was a violation of Section 8 (b) (4) (A) of the Act, we are surprised by the Board's brief which apparently now argues that such question is not posed, and that the withdrawal was "because" of another object.

In its Supplemental Memorandum withdrawing its opposition to certiorari herein, the Board said (p. 1):

> "The Petition for a Writ of Certiorari in this case, like the petition in No. 108, this Term, *poses the*

> *question* whether the action of a union in calling a strike of its members employed on a construction job, *because* the owner thereof engaged the services of a subcontractor who employed non-union labor on the project, violates Section 8(b)(4)(A) of the Act. For the reason stated in the Government's Memorandum in No. 108, which is being filed concurrently herewith, *we believe that this question now warrants review by this Court*, and we accordingly withdraw our opposition to certiorari with respect to this issue." (Italics ours.)

Turning, accordingly, to the Government's Memorandum in No. 108, we find formulation of a like question; and the statement that such question has been differently decided by Courts of Appeal, and hence (p. 2):

> "Because of the conflict and *the importance of the question* in the administration of the Act, the Government intends to petition for a writ of certiorari to review the decision of the Court of Appeals for the District of Columbia Circuit in the *Denver* case." (Italics ours.)

The Board's current brief in the present case causes us surprise in that seemingly it does not argue "the question" which, the Board heretofore said, the case "poses", but shunts it aside by contending that the withdrawal was "because" of another object.

Thus, the gravamen of the Board's present brief seems to be the following contention (p. 17):

> "In these circumstances the fact that the strike was called and continued in effect pursuant to petitioner union's rules which prohibit union members from working on a job when non-members are employed (R. 105, 123, 130-131, 134), cannot disguise the

fact that *an* object of the strike was to force Stanley to cease doing business with Watson."

If all that is really involved in this case is a question of fact as to "*an* object," we fail to understand the Board's recommendation to this Court that certiorari be granted.

Our position is that the Board was right in its aforesaid Supplemental Memorandum that this case "poses the question" of law therein formulated as of "importance in the administration of the Act."

POINT II

"The question" which, as stated in the Board's Supplemental Memorandum, this case "poses", is inherent in the findings.

Thus, the Board's Decision in this case stated as the conceded fact (R. 54):

> "It is conceded that on August 21, 1947, the day before Section 8(b)(4)(A) became effective, the Union's business representative, Henderson, ordered the carpenters to cease work at the Stanley residence *because* Watson's non-union employees were also performing work on the job, and that thereafter, pursuant to said order, which was never rescinded, and at all times material remained effective, the carpenters refused to work on the job." (Italics ours.)

The same "because" appears in other findings. For example (R. 27; 51):

> "There was no attempt to prevent Watson's employees from working on this or any other job. There was no picketing or any of the usual methods used to persuade employees not to work—*simply a concerted*

refusal to continue working with the non-union workers, in accordance with long established union precedent." (Italics ours.)

For further example (R. 21; 51; 131-3):

> "Business Agent Henderson testified credibly that it was and had been for many years the practice of Local 74 not to permit their union members to work on a job where non-union members were employed; that, in this instance, Local 74 ordered the work stoppage of its members when it learned that non-union employees of Watson's were also working on the Stanley residence; and that it would have been a violation of the rules of the Union for the carpenters to have returned to that particular job on August 22 or thereafter."

Indeed, the Board's Main Brief in support of its former opposition to certiorari herein conceded (p. 8):

> "Henderson gave the order *in accordance with* a long standing rule of Local 74 not to permit its members to work on a job where non-union workers are employed." (Italics ours.)

If these findings mean what they say, then it seems to us that in its aforesaid Supplemental Memorandum the Board was right in formulating "the question" which it asserted that this case "poses," and in defining the "because" of the withdrawal.

POINT III

There is not a particle of evidence in this case that the Local would have permitted a violation of its own working rules and "long established union precedent", if Stanley had injected on the job non-union men employed by himself or from any other source whatever.

Everyone testified that *before* Stanley made any contract at all with Watson's he was fully warned and knew of the working rules of the union whose members had been employed to do the job; and that he knew that laying wall and floor coverings was within the crafts jurisdiction of the Local, whose members were competent and experienced for such work.

For example, Stanley himself testified on direct examination (R. 92):

> "Before I went to Watson's he (Parker) said that 'The Union men are not going to work with their men; there'll be trouble.'
>
> "Q. Did he tell you at that time his men—his carpenters were members of the Respondent Union?
>
> "A. He did."

Stanley also had knowledge in advance that Watson's employees were non-union men. Thus, Stanley testified (R. 105) that "Mr. Parker told me they (Watson's men) were non-union and it seems to be a general knowledge that they were non-union. * * *" Stanley testified that Parker told him this "when we first started looking for material" (R. 105).

Parker testified that when Stanley suggested that they go to Watson's store to look at material (R. 139):

> "* * * I told him, I said, 'Mr. Stanley,' I said, 'Watson's works non-union men,' and I said, 'My men can-

not and will not work, according to trade rules of the Union, will not work with non-union men * * * .' "

It was for this reason, says Watson's store manager, that Stanley first tried to induce Watson's to sell him the material *separately*, so that it could be installed by the Local's members (86).

POINT IV

Under the contract between Parker and Stanley, Parker was to furnish the material and the workmen to complete the job.

In its Opinion the court below correctly stated that early in August 1947 Stanley "contracted with D. R. Parker to improve and renovate the house" (R. 188); and that (R. 188)

> "The contract provided that Parker should furnish the material and sufficient workmen to complete the job not later than August 15, 1947."

The contract is dated August 4, 1947. It specifically provided that Parker agrees (R. 184)

> "to furnish a sufficient number of men on the job and material and to diligently pursue the work continually until it is fully completed."

Under this contract, Parker had the sole right to hire and fire; and he hired only union men on an at will basis. They were "free to quit at any minute or any hour * * * that's their privilege" (R. 138-9).

As the court below said in its Opinion (p. 189):

> "All workmen hired by Parker were union members, including carpenters who were members of Local 74."

POINT V

The Board's brief is, we submit, in error in its claim that the employment, as Parker and Stanley set it up, was not an employment under all-union working conditions, and was not subject to the rules of the Union, and, as between Parker or Stanley on the one side and the Union on the other, did not represent collective bargaining.

(1) The working rules of the Union represent and constitute the union side of any employment of its members. They represent a standing collective bargain as to the terms upon which employers must employ its members.

In the present instance the Examiner found and the Board confirmed (R. 18, 51):

> "Parker was a member of Local 74, and all the workmen, besides the carpenters, employed by him on the job were union men."

The Examiner stated that he "assumed that Stanley was the actual employer" (R. 18); but the Board stated that "it is immaterial for purposes of this decision whether the carpenters were employees of Stanley or of Parker" (R. 54).

In either event, here was a contract made with a union contractor (himself a member of Local 74) who invariably employed, and, by reason of his own union membership, could employ, only union men. Stanley himself has admitted that "it was my understanding with Parker that union men were going to do the work," and that he knew they had been and were so employed for the purpose (R. 92, 96).

Stanley also admitted that Parker was the "general contractor," and that it "was his job to hire them (the men) and supervise the work" (R. 101).

Under these circumstances, the union working conditions and working rules became part of the employment, for they were part of the terms of the collective bargain upon which union members, among whom Parker himself was one, could be employed.

(2) The Board's brief states (p. 19) that our claim that Stanley and Parker had an understanding for the employment of union men "is an obvious afterthought".

The Board is mistaken. In our brief in the Court of Appeals we argued at length (p. 58) that "the job had been started by Stanley himself as an exclusively union employment," and that "subsequently, by sending in Watson's non-union men, Stanley attempted to force upon the Union and its members new, adverse and non-union working conditions" (p. 58).

This contention on our part was necessarily involved in our exceptions to the Examiner's "Failures or Refusal to Find" (R. 42, 43).

(3) The Board's brief also asserts that we rest our "position entirely upon a truncated excerpt from Stanley's testimony, which omits the critical qualification which Stanley added" (p. 19).

Respectfully, we cannot agree. In the first place, by this portion of Stanley's testimony (R. 96) it is entirely plain (and, so far as we can see, undisputed,) that Stanley knew that Parker was a union contractor and member; and also that Stanley knew that Parker accordingly had, as the Examiner found (R. 18) and as Parker testified (R. 138), employed only union men.

In the second place, Stanley himself testified that he "always enjoyed having Union men working, preferred them"; and that "it was my understanding with Parker that Union men were going to do the work" (R. 96).

We do not see how these two statements and admissions by Stanley can possibly be interpreted otherwise

than as referring to the time when he made the contract with Parker. Certainly this "understanding with Parker" could not have been at any other time, for he could not have had such "understanding" with Parker when he signed the contract with Watson's for installation by non-union men, and he could not have had such an "understanding" with Parker on August 21 when Watson's non-union men had already begun to do their work.

As to the rest of Stanley's accompanying testimony, to wit, "and that I certainly didn't mind having Union men do it if I could possibly find material for my floor covering and walls" (R. 96), that testimony, as we have always construed it, was not a "qualification" made at the time of his contracting with Parker, but rather was an affirmation that if he, instead of Parker, could find material for the floor and wall covering he was willing to have Parker's union men install it. If it was a "qualification" at all, it was simply a qualification of Parker's contractual right "to furnish" the material (R. 184). According to the terms of the written contract with Parker and the finding of the Examiner (R. 17):

> "Under the terms of the agreement Parker was to furnish and supervise necessary workmen and to select material needed for the improvements."

The Examiner correctly found that installation of this character was within the crafts jurisdiction of Local 74 which had members competent and experienced for doing it (R. 15; 19 footnote 15).

Stanley's contract with Parker contained no reservation of any right on the part of Stanley to engage another contractor, or to have the men of such other contractor do any portion of the work, or to employ union or non-union men himself. It was Parker's right and obligation, through men furnished by himself,

> "to diligently pursue the work continually until it is fully completed" (R. 184).

There was not a word in the contract which preserved or reserved to Stanley (as contended in the Board's brief, p. 20) the right to "be free to use non-union sources"; and, even if there had been, Stanley could not thereby require Local 74 or its members to recognize or acquiesce in his subsequent breaking down of their working conditions which, up to the moment when he injected non-union men, had, as the Examiner found (R. 18), been exclusively union.

(4) Whether or not, as the Board contends (p. 20), after his repeated warnings and protests to Stanley, Parker acquiesced in Stanley's decision to send in non-union men in defiance of the Union's working rules, any such acquiescence could not adversely affect or diminish in any way the right of the Union and its members to stand by the union working conditions under which they had been employed up to that point, or to honor and observe their working rules.

Indeed, the Board's own brief puts *the nub of the controversy* precisely when it says (p. 21):

> "And Parker testified that the nub of his 'controversy' with Stanley was that his union men, presumably because of their union rule, would not work with Watson's non-union workmen (R. 142-3)."

Since this was the "nub of his controversy" which Parker had with Stanley before Stanley had elected to challenge the Union and its working conditions and rules, how can it be claimed not to be *"the nub of the controversy"* which the Union had with Stanley after Stanley elected, with profanity, to ally himself with Watson's in the matter of installation and to launch an offensive (R. 140)?

(5) Parker's so-called "acquiescence" was in reality nothing but the following attitude as described by himself (R. 140-1):

> "I told George, Mr. Stanley at the time, I said, 'George,' I say, 'You've stuck your neck out.' I said, 'These men absolutely will not work with non-union men and I've told you,' and I says, *'I'm not responsible for the job* when the (Watson's) men come on the job.' "

Parker testified that he and his union men would have installed Watson's materials as "in other cases" (R. 141); but that, when Stanley contracted for non-union installation, he told Stanley (R. 142):

> "I've advised you of what would happen on the job; *now you've gone contrary to our contract* and it's your baby."

POINT VI

Finally, the Board's brief contends that "an object of the strike was to force Stanley to cease doing business with Watson's", and that in consequence it violated Section 8 (b) (4) (A), irrespective of the compulsory obligation of the Local's working rules, and irrespective of the provocative act of Watson's and Stanley in injecting non-union men into the Union employment, and irrespective of the finding that the withdrawal was "simply a concerted refusal to continue working with the non-union workers, in accordance with long established union precedent" (R. 27; 51).

(1) At page 17, the Board's brief says:

> "In these circumstances the fact that the strike was called and continued in effect pursuant to petitioner union's rules which prohibit union members from working on a job when non-members are employed (R. 105, 123, 130-131, 134), cannot disguise the fact that *an* object of the strike was to force Stanley to cease doing business with Watson."

We believe that we have fully answered this contention in Points II and III of our main brief (pp. 33-38, 39-42).

The contention overlooks the order of events and the source and cause of the withdrawal from Stanley's residence.

The evidence shows conclusively that, shortly after Stanley made his contract with Parker, Parker's union employees undertook the work at Stanley's residence and continued to perform it satisfactorily (R. 103). There is not a particle of evidence that they would not have completed the work satisfactorily, or that they would not have

competently installed Watson's materials if delivered to them for installation, as they had done on other occasions (R. 133, 141)?

The nub and source of the controversy that developed at Stanley's residence was not Stanley's purchase of materials at Watson's, but the unit, lump-sum contract which Stanley made, at the insistence of Watson's (R. 18), covering both materials and installation. Thereby Stanley took a portion of the work out of the hands of Parker as the general contractor (R. 101), and turned it over to Watson's as a new contractor operating with non-union men. That was an act of provocation. It was a knowing subversion of the union working conditions and rules, as well as of Parker's contractual right, admitted by Stanley himself (R. 101), to do the hiring.

Stanley and Watson's thereby aligned themselves to take over with non-union men; and Watson's was glad of an opportunity to forge a weapon to strike at the Union (R. 139, 140). As long as that alliance existed and continued in operation, the Local and its members could not be guilty of the breach of any law in quietly and peaceably withdrawing.

(2) Assuming, for the sake of argument, the correctness of the finding below that Henderson told Stanley that as long as there stood the unit contract with Watson's covering jointly materials and labor, the Local's members could not stay and would not return, *Henderson was entirely right.* He was merely performing his duty. *He was merely recognizing a fact which Stanley's own act had created.*

Stanley could not have it both ways. He could not have the job done by both union men and by non-union men. As long as he stood by his contract with Watson's to have the job done by non-union men, the union men would not participate further. (See our main brief, pp. 33-42).

The success of Watson's in bringing Stanley into an alliance with it against the union working conditions and working rules at Stanley's job, could not deprive the Local and its members from the right to act defensively, and to say to Stanley that, since he stood by such alliance, they could not stay on the job and thus be forced into furthering *Watson's objects* and their own subversion.

(3) No one testified, and there is not a particle of evidence, that any one told Stanley that the Local's members would not themselves lay Watson's materials. On the contrary, he was told by Parker and Henderson that they would, and that the only objection was to the injection of non-union men (139, 140-1, 123-4). Stanley understood this; and, for that reason, he sought unsuccessfully to have Watson's sell him the materials without installation by Watson's non-union employees (R. 86).

No one testified, and there is not a particle of evidence, that the Local or its members had ever refused, or had ever threatened to refuse, to lay materials *bought by any one from Watson's.* On the contrary, both Parker and Henderson testified without contradiction that they had done so and were willing to continue to do so (R. 133, 141).

No one testified, and there is not a particle of evidence, that the Local or its members were boycotting Watson's materials as such, or that any one told Stanley that they were.

Henderson testified (R. 124):

> "Q. Did you state to anybody that you had in mind the purpose of boycotting Watson's goods or their jobs?
>
> A. No, sir.
>
> Q. Did you have that purpose in mind when you took your men off the job?
>
> A. No, sir; we taken them off because we will not work with non-union men."

(4) The fact that in August, 1947, the Local was peacefully maintaining a single picket in front of Watson's store, carrying a placard communicating to the public the truthful statement that "this store employs non-union labor" (R. 16), in no way affects the legal issue here.

Both the Examiner and the Board held that this orderly picketing was entirely lawful (R. 21-25, 58, 59). The picket was withdrawn on August 28, 1947 (R. 16).

There is not a particle of evidence that the Local or its members refused, or threatened to refuse, to work for any one who had bought, or might buy, materials from Watson's, or that they had ever picketed any customers of Watson's.

Indeed, the Board's own brief now concedes (p. 18):

> "Parker's employees did not cease work as an incidental consequence of picketing directed solely at Watson's employees."

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 85

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., AND JACK HENDERSON, INDIVIDUALLY AND AS AGENT FOR LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 200–210) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 53–63, 12–37) are reported at 80 NLRB 533.

JURISDICTION

The decree of the court below was entered on April 4, 1950 (R. 199). The petition for a writ

of certiorari was filed on May 22, 1950. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

STATUTE INVOLVED

The pertinent provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*), are set forth in the Appendix, *infra*, pp. 19–22.

QUESTIONS PRESENTED

The Board found that petitioners conducted a secondary boycott in violation of Section 8 (b) (4) (A) of the Labor Management Relations Act against Watson's Specialty Store by continuing in effect, after the effective date of the Act, a strike against one Stanley for the purpose of forcing Stanley to cease doing business with Watson. Watson is engaged in commerce within the meaning of the Act, although Stanley is not. The Board ordered petitioners to cease and desist from conducting such secondary boycotts against Watson. The questions presented are:[1]

[1] Petitioners' questions numbered 3, 4, 5, and 7 (Pet., pp. 13–14) rest on the assumptions that the unfair labor practice found consisted merely of a concerted refusal of employees to continue working with non-union men and that the Board's order requires employees to return to work. Since, as we show below, these assumptions are entirely unwarranted (*infra*, pp. 10, 16–17), questions arising out of them are not properly presented.

1. Whether the Board properly exercised jurisdiction over the unfair labor practice.

2. Whether the Board's finding that an object of the strike was to force Stanley to cease doing business with Watson is supported by substantial evidence.

3. Whether the Board properly found that petitioners violated Section 8 (b) (4) (A) by continuing in effect, after the effective date of the Act, a secondary boycott initiated prior to the Act's effective date.

4. Whether completion of Stanley's construction project, at which the strike occurred, renders the Board's order moot and unenforceable.

STATEMENT

A. *The facts as found by the Board.*—Upon the usual proceedings under Section 10 of the National Labor Relations Act, as amended, the Board, on November 22, 1948, issued its findings of fact, conclusions of law, and order. The pertinent facts may be summarized as follows:

The Ira A. Watson Company, hereinafter called Watson, is a corporation which maintains and operates a chain of 26 or 27 retail stores located in seven States including Tennessee (R. 54, 15; 66).[2] In about March of 1947, Watson began the

[2] Where, in a series of record references, a semicolon appears, the references preceding the semicolon are to the Board's findings, and those following the semicolon are to the supporting evidence.

operation of "Watson's Specialty Store" in Chattanooga, for the sale of paints and venetian blinds, and the sale and installation of coverings such as metal and linoleum coverings for walls, and asphalt tile, rubber tile, carpeting, and linoleum for floors (R. 15–16; 66–68). In the operation of this specialty store, Watson, for the period from March to September 1947, purchased goods valued at approximately $93,000, of which approximately 33 percent represented materials shipped to it at Chattanooga from States other than the State of Tennessee; approximately 30 percent represented materials purchased from local sources but manufactured outside the State and shipped to distributors in Tennessee; and approximately 35 percent represented stock received from a general store Watson had discontinued operating in Chattanooga, most of which stock originated outside Tennessee (R. 16; 68–71, 189–190). During the same period, Watson's sales and installation jobs amounted to approximately $100,000 of which about 8 percent represented sales and installations in States other than the State of Tennessee (R. 16; 73–77, 191–192).

Petitioner, Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., hereinafter called Local 74, is a craft union affiliated with the United Brotherhood of Carpenters and Joiners of America which in turn is an affiliate of the American Federation of Labor (R. 16; 126). Local 74 admits to membership

carpenters and other craftsmen, including those who perform work similar to that done by Watson's installation employees (R. 16; 126–127). It has jurisdiction over member workmen in Chattanooga and the surrounding area, including portions of the States of Georgia and Alabama. Petitioner Jack Henderson, during all of the times material herein has been, and is, the business agent of Local 74 (R. 16; 126).

When Watson opened the specialty store, Henderson, as business agent for Local 74, sought unsuccessfully to persuade Watson's installation employees to join the Union (R. 57, 17; 81–82). A few days later, Henderson requested A. D. Smith, the manager of the specialty store, to execute a closed shop contract with Local 74 as the bargaining agent of the installation employees (R. 57, 17; 82). Smith refused to execute the contract and, in the latter part of March, petitioners placed a picket in front of the specialty store during business hours carrying a placard which announced, over the name of Local 74, that Watson employed non-union labor (R. 17; 82).[3] This picketing continued until about August 28, 1947 (R. 18; 82–83).

On or about August 7, while the picketing above described continued, George D. Stanley, who had recently purchased a house near Chattanooga, contracted with D. F. Parker to improve and

[3] This picketing is in no way involved in petitioners' conduct which the Board found violative of the Act (R. 22–26).

renovate the house (R. 18; 91). Under the terms of the agreement, Parker was to furnish and supervise necessary workmen and to select the material needed for the improvements, while Stanley was to pay the wages of the workmen and the cost of necessary materials, pay a commission of 10 percent of the cost of both to Parker, and turn over to Parker the withholding taxes, social security deductions, and other items deducted from the wages of the workmen (R. 18; 92, 196). Pursuant to the terms of this agreement, Parker hired the necessary workmen, including members of Local 74 to do the carpentry work, obtained such material as was needed, and proceeded to renovate and improve the building in accordance with the contract (R. 19; 143–144).

While the work was in progress, it became necessary to select floor and wall coverings for the bathrooms and kitchen. Neither Parker nor Stanley was able to find the type of covering satisfactory to Stanley at any establishment in Chattanooga except Watson's, and Watson insisted that its own employees, who were non-union, must install any coverings it sold (R. 19; 92–93, 95, 144–145).

Parker and Stanley discussed the complications that might arise with the union employees employed at the Stanley residence if Watson's non-union workmen installed the coverings. At Parker's suggestion, it was agreed that Watson's

men should do their work at hours when the union men were off duty (R. 19; 95). Thereupon, Stanley made a special contract with Watson for the purchase and installation of the floor and wall coverings (R. 19; 84, 195).

On Sunday, August 17, while no other workmen were present, Watson's non-union employees began the work of installing the floor and wall covering (R. 19; 85, 96). They continued the work during regular hours on Monday and Tuesday, in the presence of the union workmen, including the members of Local 74 (R. 19; 85). On Wednesday, August 20, two of the union carpenters stopped work for about a half hour because of the presence on the job of Watson's non-union employees (R. 19–20; 116, 150–151). Parker was able to smooth over this difficulty and the carpenters returned to work and finished the day (R. 20; 151). However, on the morning of August 21, when one of Watson's non-union employees, Pozzuto, reported for work, Parker told him that he could not work that day as the union men were threatening to quit and suggested that he complete the installation work at night (R. 20; 85, 121). When Pozzuto refused, Parker telephoned Watson's manager, Smith, who directed Pozzuto to leave the building site (R. 20; 85–86, 121).

In the afternoon of the same day (which was one day before Section 8 (b) (4) (A) of the Act

became effective),[4] Henderson called at the Stanley residence and ordered the union carpenters, four in number, to "pack up their tools" and stop working on the Stanley residence because Watson's employees were working there (R. 57, 20; 97-99). Stanley arrived at about the same time and sought to persuade Henderson to countermand his order (R. 20; 100). Henderson suggested that Stanley cancel his contract with Watson as a means of getting the union carpenters to return to work (R. 57; 101, 111). This, Stanley declined to do. Thereafter, pursuant to Henderson's order, the union carpenters did not return to work on the following day (R. 20, 21; 111). Eventually, however, two of them disregarded the order and, without the knowledge or consent of Local 74, returned and finished the necessary carpentry work by the end of August (R. 21; 159). The installation of the floor and wall covering was completed by Watson's employees on or about August 28 (R. 21; 86).

The order given by Henderson was not revoked and it has never been rescinded. Henderson gave the order in accordance with a long standing rule of Local 74 not to permit its members to work on a job where non-union workers are employed.

[4] Briefly, Section 8 (b) (4) (A) of the Act, as here applicable, makes it an unfair labor practice for a labor organization or its agents to engage in, or induce employees to engage in, a strike an object of which is to force an employer to cease doing business with any other person (*infra*, pp. 19–20).

He testified that since Watson's non-union employees were working on the Stanley residence, it would have been a violation of the rules of Local 74 for the carpenters to have returned to that job on August 22 or thereafter. (R. 21; 136–138.)

B. *The Board's conclusions.*—The Board found that Watson was engaged in commerce within the meaning of the Act (R. 15–17, 54), that petitioners had induced employees to engage in a strike at the job on the Stanley residence, an object of which was to force Stanley to cease doing business with Watson (R. 57–58), that "any widespread application of such pressure by * * * [petitioners] to other customers of Watson, such as can reasonably be anticipated on the basis of this record, could well result in a substantial decrease in Watson's business and in material purchased from points outside the State of Tennessee" (R. 55), and that, accordingly, petitioners' conduct affected commerce within the meaning of the Act (R. 56). The Board further found that, although the strike was called on August 21, 1947, the day before the effective date of Section 8 (b) (4) (A) of the Act, it was continued on and after August 22, 1947, the effective date of said section of the Act (R. 58–60). The Board concluded therefore, that on and after August 22, 1947, petitioners engaged in conduct in violation of Section 8 (b) (4) (A) of the Act (R. 59–60).

C. *The Board's order.*—The Board ordered petitioners to cease and desist from engaging in, or inducing the members of Local 74 to engage in, a strike or concerted refusal in the course of their employment to perform services for any employer, where an object thereof is to require any employer or other person to cease doing business with Watson, and to post the customary notices of compliance (R. 61).

D. *The proceedings in the Court of Appeals.*—On June 15, 1949, the Board filed in the court below a petition for enforcement of its order (R. 1–5). On April 4, 1950, the court below handed down its opinion (R. 200–210) and entered its decree (R. 199) enforcing the Board's order in full.

ARGUMENT

1. Petitioners' contention (Pet., pp. 17–34) that the Board was without jurisdiction over the unfair labor practices here found because Stanley was not himself engaged in interstate commerce raises no substantial question warranting review. The unfair labor practice consisted of a secondary boycott against Watson, who, as the Board found, and as the evidence shows, is engaged in interstate commerce.[5] As the court below observed (R. 205), petitioners "treat this controversy as if it

[5] Petitioner does not challenge the Board's finding (R. 15–17, 54), that Watson is "engaged in commerce within the meaning of the Act" (Section 2 (6) and (7)).

were merely one between Stanley and union workers concerning wages, and ignore the Board's finding of fact based upon substantial evidence that the purpose of the ordered walk-out was to force Stanley to cease doing business with Watson's and thus conduct an illegal secondary boycott against a concern a part of whose business was interstate commerce."

The argument that the effect of the restraint is entirely local overlooks the impact of the boycott upon Watson's interstate business. As this Court has stated (*United States* v. *Women's Sportswear Association*, 336 U. S. 460, 464):

> The source of the restraint may be intrastate * * *; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

The restraint upon interstate commerce resulting from petitioners' boycott of Watson may not be measured solely by the impact of the strike at the Stanley residence. As the Board here found, it may reasonably be anticipated on the basis of this record that petitioners' boycott of Watson may be extended to other customers and "could well result in a substantial decrease in Watson's

business * * *." (*supra*, p. 9).[6] It is well settled that the Act applies to "individual cases without showing any specific effect upon interstate commerce, *United States* v. *Walsh*, 331 U. S. 432, 437–438; it is enough that the individual activity when multiplied into a general practice is subject to federal control, *Wickard* v. *Filburn* * * * [317 U. S. 111], or that it contains a threat to the interstate economy that requires regulation." *Mandeville Island Farms, Inc., et al.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 236. Accord: *International Brotherhood of Electrical Workers, Local 501, et al.* v. *National Labor Relations Board*, 181 F. 2d 34 (C. A. 2), and *United Brotherhood of Carpenters and Joiners of America* v. *Sperry*, 170 F. 2d 863 (C. A. 10).[7]

Petitioners' argument that the Act was not intended to apply to the construction industry is refuted by the legislative history which shows that Congress sought to reach the practices prevalent among some building trades unions of refusing to install in any building the products of a particular manufacturer solely because of the union or non-union status of the manufacturer's

[6] For this reason petitioners' contention that the case falls under the *de minimis* principle is entirely unsound.

[7] The cases relied on by petitioners (Pet. 18–22) reflect "conceptions formerly held but no longer effective to restrict either Congress' power, *Wickard* v. *Filburn*, 317 U. S. 111, or the scope of the * * * coverage" of such legislation as the National Labor Relations Act. *Mandeville Island Farms* case, *supra*, 334 U. S., at p. 229.

employees. See, *e. g.*, Report of the Senate Committee on Labor and Public Welfare, S. Rep. No. 105, 80th Cong., 1st Sess., p. 22, and statements of Senator Taft in the course of debate on the proposed Act, 93 Cong. Rec. 4199. See also, 93 Cong. Rec. 4132, 5011. The argument which was rejected by the court below also has been rejected by the other courts of appeals which have considered the question. *International Brotherhood of Electrical Workers, Local 501, et al.* v. *National Labor Relations Board*, 181 F. 2d 34 (C. A. 2); *United Brotherhood of Carpenters and Joiners of America* v. *Sperry*, 170 F. 2d 863 (C. A. 10); *Slater* v. *Denver Building and Construction Trades Council*, 175 F. 2d 608 (C. A. 10). Accord: *LeBaron* v. *Building Trades Council*, 84 F. Supp. 629 (S. D. Cal.); *Brown* v. *Roofers and Waterproofers Union, Local No. 40, A. F. L.*, 24 LRRM 2472 (N. D. Cal.).

Nor is there merit in the contention that, because of the allegedly trivial character of the dispute, the Board, in the exercise of its discretion, should have refused to proceed. As Judge Learned Hand stated in rejecting a similar contention (*International Brotherhood of Electrical Workers, Local 501, et al.* v. *National Labor Relations Board*, 181 F. 2d 34, 36 (C. A. 2)):

> We should hesitate to say that we could have power ever to review the Board's action because we thought the situation was unimportant; but we need not now

decide more than that, if there may be such situations, they must be frivolous beyond rational question, and that the case at bar was certainly within the area of fair differences of opinion, which we must not invade.

2. Petitioners contend (Pet., pp. 34–40) that the strike resulted from Stanley's employment of non-union men and that, consequently, substantial evidence is lacking to support the Board's finding, sustained by the court below, that an object of the strike was to force Stanley to cease doing business with Watson. But the sufficiency of the evidence to support a Board finding is normally not a question warranting review by this court. In any event, the record shows, as the Board found, that the strike was not merely a refusal to work with non-union men but that it "had another and an unlawful objective": to forestall performance of the contract between Stanley and Watson and thereby prevent Stanley from doing business with Watson (R. 57–58, cf. 203, 205).* That the strike

The Board found that (R. 18, n. 11): " * * beginning in about July and continuing until well into October 1947, Local 74 ran advertisements in the Labor World (a weekly newspaper owned by the Central Labor Union which was sent to all AFL union members in the Chattanooga area, and a few subscribers, but which was not sold to the general public) naming local firms who employed members of Local 74 for installation work, and stating that Watson's employed non-union labor for this type of work. At the bottom of the advertisement which started in September appeared the statement, 'Do not be deceived by Watson's claim that this statement is not part of our craft' * * *."

may also have had other objects is irrelevant under the words of Section 8 (b) (4) (A). Appendix, *infra*, pp. 19–20. *International Brotherhood of Electrical Workers, Local 501, et al.* v. *National Labor Relations Board*, 181 F. 2d 34, 35–36 (C. A. 2); *National Labor Relations Board* v. *Wine, Liquor and Distillery Workers Union, Local 1, Etc., A. F. of L.*, 178 F. 2d 584, 586 (C. A. 2); *Shore* v. *Building & Construction Trades Council of Pittsburgh*, 173 F. 2d 678, 681–682 (C. A. 3). Cf. *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 502–504; *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525, 531–533; *A. F. of L.* v. *American Sash & Door Co.*, 335 U. S. 538, 539–540; *Building Service Employees International Union, Local 262, et al.* v. *Gazzam*, No. 449, Oct. Term, 1949; *Hughes, et al.* v. *Superior Court of California in and for the County of Contra Costa*, No. 61, Oct. Term, 1949; *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 309, et al.* v. *Hanke*, Nos. 309, 364, Oct. Term, 1949. There are no contrary holdings.

3. Petitioners' contention that the Board has here given retroactive effect to Section 8 (b) (4) (A) rests upon the fallacious assumption that the Board found petitioners' conduct in calling the strike prior to the effective date of the Act to be a violation (Pet. pp. 41–44). The court below specifically held that the Board based its finding that petitioners "were violating Section

8 (b) (4) (A), not upon their actions before the effective date of the Taft-Hartley Act, but in their keeping the strike order in effect after that amendatory Act of Congress became operative" (R. 207). That the Board may properly reach conduct continued in violation of the Act although such conduct was instituted prior to the effective date of the Act is not open to question. *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. 2d 134 (C. A. 4), certiorari denied, 302 U. S. 731; *United States* v. *Freight Association*, 166 U. S. 290, 342. In any event, petitioners' contention raises no question of general importance in the administration of the Act.

4. Petitioners' contention (Pet. pp. 16, 52–53) that the Board's order is moot, for the reason that all work on Stanley's residence has been completed, was properly rejected by the court below (R. 209–210). It is settled that a changed circumstance such as that cited by petitioners, like voluntary discontinuance of an unfair labor practice, will not render moot an order of the Board lawful when made. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *National Labor Relations Board* v. *Pool Mfg. Co.*, No. 435, Oct. Term, 1949; *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 225.

5. Since the unfair labor practice found by the Board consisted of petitioners' conduct in con-

tinuing in effect their order to employees to go on strike, question "3" urged by petitioners, which rests on the assumption that the finding was predicated upon the action of the employees in leaving work in concert, is not presented. Similarly, since the Board's order does not require any employees to return to work, but merely requires petitioners to revoke their strike order, the questions numbered 4, 5, and 7 of the petition, which rest on the contrary premise, are not presented. That the Board's findings and order, as written, do not impose involuntary servitude on petitioners or the employees is established by controlling decisions of this Court. *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490; *International Union, U. A. W., A. F. of L., Local 232* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 251. Accord: *National Labor Relations Board* v. *Wine, Liquor & Distillery Workers Union, Local 1, etc., A. F. of L.*, 178 F. 2d 584, 587–588 (C. A. 2); *International Brotherhood of Electrical Workers, Local 501, et al.* v. *National Labor Relations Board*, 181 F. 2d 34, 39–40 (C. A. 2). Cf. *National Labor Relations Board* v. *National Maritime Union of America*, 175 F. 2d 686, 692 (C. A. 2), certiorari denied, 338 U. S. 954; *Printing Specialties and Paper Converters Union, Local 388, A. F. of L.* v. *LeBaron*, 171 F. 2d 331, 334–335 (C. A. 9); *United Brotherhood of Carpenters and Joiners of America* v. *Sperry*, 170 F. 2d 863, 868–869 (C. A. 10).

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1950.

APPENDIX

The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*) are as follows:

* * * * *

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

"SEC. 2. When used in this Act—

* * * * *

"(6) The term 'commerce' means, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

"SEC. 8. * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other produeer, processor, or manufacturer, or to cease doing business with any other person; * * *

* * * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * * *

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *

"(c) * * * If upon the preponderance of the testimony taken the Board shall

be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge

such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347)."

* * * * *

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 85

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., AND JACK HENDERSON, INDIVIDUALLY AND AS AGENT FOR LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 187-196) is reported at 181 F. 2d 126. The findings of fact, conclusions of law and order of the Board (R. 50-61, 11-37) are reported at 80 NLRB 533.

JURISDICTION

The decision of the court below and its decree enforcing the Board's order were entered on April

4, 1950 (R. 186, 187). The petition for a writ of certiorari was granted on December 11, 1950. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The Board found that petitioners conducted a secondary boycott against Watson's Specialty Store, in violation of Section 8 (b) (4) (A) of the Labor Management Relations Act, by continuing in effect, after the effective date of the Act, a strike against one Stanley for the purpose of forcing Stanley to cease doing business with Watson. Watson is engaged in commerce within the meaning of the Act, although Stanley is not. The Board ordered petitioners to cease and desist from conducting such secondary boycott against Watson. The questions presented are:

1. Whether the Board's finding that an object of the strike was to force Stanley to cease doing business with Watson is supported by substantial evidence.

2. Whether the Board properly found that petitioners violated Section 8 (b) (4) (A) by continuing in effect, after the effective date of the Act, a secondary boycott initiated prior to the Act's effective date.

3. Whether the Board properly found that the unfair labor practice affected commerce.

4. Whether Section 8 (b) (4) (A) and the Board's order based thereon violate the prohibition against involuntary servitude.

5. Whether completion of Stanley's construction project, at which the strike occurred, renders the Board's order moot and unenforceable.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), are set forth in the Appendix, *infra*, pp. 53-56.

STATEMENT

Upon the usual proceedings under Section 10 of the National Labor Relations Act, as amended, the Board, on November 22, 1948, issued its findings of fact, conclusions of law, and order. The pertinent facts as found by the Board and as shown by the evidence may be summarized as follows:

I. The Board's Findings of Fact

1. *The business of the primary employer; the basic dispute between it and petitioners.*

The Ira A. Watson Company, hereinafter called Watson, is a corporation which maintains and operates a chain of 26 or 27 retail stores located in seven states, including Tennessee (R. 52, 14; 63-64).[1] In about March of 1947, Watson began the

[1] Where, in a series of record references, a semicolon appears, the references preceding the semicolon are to the Board's findings, and those following the semicolon are to the supporting evidence.

operation of "Watson's Specialty Store" in Chattanooga, for the sale of paints and venetian blinds, and the sale and installation of metal and linoleum coverings for walls, and asphalt tile, rubber tile, carpeting, and linoleum for floors (R. 14; 64-65). From March to October 1947, Watson purchased for resale by the specialty store goods valued at approximately $93,000. Approximately 33 percent of these materials were shipped directly to Watson's at Chattanooga from states other than the State of Tennessee; approximately 30 percent were purchased by Watson's from local distributors who had in turn received the goods from sources outside the State of Tennessee; and approximately 35 percent represented stock received from a general store Watson had discontinued operating in Chattanooga, most of which had originated outside Tennessee (R. 14-15; 65-69, 178-179). During the same period, the specialty shop's sales and installation jobs amounted to approximately $100,000, of which about 8 percent represented sales and installations in states other than the State of Tennessee (R. 15; 71-75, 180-181). Watson also ships merchandise from its Chattanooga store to retail outlets of the company located in other states (R. 73-74, 181-182).

Petitioner, Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., hereinafter called Local 74, is a craft union affili-

ated with the United Brotherhood of Carpenters and Joiners of America which in turn is an affiliate of the American Federation of Labor (R. 15; 121). Local 74 admits to membership carpenters and other craftsmen including those who perform work similar to that done by Watson's installation employees. It has jurisdiction over member workmen in Chattanooga and the surrounding area, including portions of the States of Georgia and Alabama (R. 15; 121-122, 125). Petitioner Jack Henderson, during all of the times material herein has been, and is, the business agent of Local 74 (R. 15; 121).

When Watson opened the specialty store, Henderson, as business agent for Local 74, sought unsuccessfully to persuade Watson's installation employees to join the Union (R. 55, 16; 78-79). A few days later, Henderson requested A. D. Smith, the manager of the specialty store, to execute a closed shop contract with Local 74 as the bargaining agent of the installation employees (R. 55, 16; 79). Smith refused to execute the contract and, in the latter part of March, petitioners placed a picket in front of the specialty store during business hours carrying a placard which announced, over the name of Local 74, that Watson employed non-union labor (R. 55, 16; 79).[2] This picketing continued until about August 28, 1947 (R. 16; 80).

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[2] This picketing is in no way involved in petitioners' conduct which the Board found violative of the Act (R. 21-25, 51).

2. *The strike to force or require Stanley to cease doing business with Watson.*

On or about August 7, while the picketing above described continued, George D. Stanley, who had recently purchased a house near Chattanooga, contracted with D. F. Parker to improve and renovate the house (R. 17; 88). Under the terms of the agreement, Parker was to furnish and supervise necessary workmen and to select the material needed for the improvements, while Stanley was to pay the wages of the workmen and the cost of necessary materials, pay a commission of 10 percent of the cost of both to Parker, and turn over to Parker the withholding taxes, social security deductions, and other items deducted from the wages of the workmen (R. 17; 89, 183-184). Pursuant to the terms of this agreement, Parker hired the necessary workmen, including members of Local 74 to do the carpentry work, obtained such material as was needed, and proceeded to renovate and improve the building in accordance with the contract (R. 18; 138).

While the work was in progress, it became necessary to select floor and wall coverings for the bathrooms and kitchen. Neither Parker nor Stanley was able to find the type of covering satisfactory to Stanley at any establishment in Chattanooga except Watson's, and Watson insisted that its own employees, who were non-union, must install any coverings it sold (R. 18; 64-65, 89-90, 92).

Parker and Stanley discussed the complications that might arise with the union employees employed at the Stanley residence if Watson's non-union workmen installed the coverings. At Parker's suggestion, it was agreed that Watson's men should do their work at hours when the union men were off duty (R. 18; 92, 93). Thereupon, Stanley made a special contract with Watson for the purchase and installation of the floor and wall coverings (R. 18; 81, 183).

On Sunday, August 17, while no other workmen were present, Watson's non-union employees began the work of installing the floor and wall covering (R. 18-19; 81-82, 93). They continued the work during regular hours on Monday and Tuesday, in the presence of the union workmen, including the members of Local 74 (R. 19; 82, 111). On Wednesday, August 20, two of the union carpenters stopped work for a about a half hour because of the presence on the job of Watson's non-union employees (R. 19; 112, 144-145). Parker was able to smooth over this difficulty and the carpenters returned to work and finished the day (R. 20; 145). However, on the morning of August 21, when one of Watson's non-union employees, Pozzuto, reported for work, Parker told him that he could not work that day as the union men were threatening to quit and suggested that he complete the installation work at night (R. 19; 116-117). When Pozzuto refused, Parker telephone Watson's

manager, Smith, who directed Pozzuto to leave the building site (R. 19; 82-83, 117).

In the afternoon of the same day (which was one day before Section 8 (b) (4) (A) of the Act became effective), Henderson called at the Stanley residence and ordered the union carpenters, four in number, to "pack up their tools" and stop working on the Stanley residence because Watson's employees were working there (R. 19, 55; 96-97). Stanley arrived at about the same time and sought to persuade Henderson to countermand his order (R. 20; 96). Henderson suggested that Stanley cancel his contract with Watson as a means of getting the union carpenters to return to work (R. 55; 97, 106-107). This, Stanley declined to do. Thereafter, pursuant to Henderson's order, the union carpenters did not return to work on the following day (R. 20, 21; 107). Eventually, however, two of them disregarded the order and, without the knowledge or consent of Local 74, returned and finished the necessary carpentry work by the end of August (R. 20-21; 152-153). The installation of the floor and wall covering was completed by Watson's employees on or about August 28 (R. 20; 83).

The order given by Henderson was not revoked and it has never been rescinded. Henderson gave the order in accordance with a long standing rule of Local 74 not to permit its members to work on a job where non-union workers are employed. He

testified that since Watson's non-union employees were working on the Stanley residence, it would have been a violation of the rules of Local 74 for the carpenters to have returned to that job on August 22 or thereafter. (R. 21; 131-132).

II. The Board's Conclusions

The Board found that Watson was engaged in commerce within the meaning of the Act (R. 51-54), that petitioners had induced employees to engage in a strike at the job on the Stanley residence, an object of which was to force Stanley to cease doing business with Watson (R. 55), that "any widespread application of such pressure by * * * [petitioners] to other customers of Watson, such as can reasonably be anticipated on the basis of this record, could well result in a substantial decrease in Watson's business and in materials purchased from points outside the State of Tennessee" (R. 53), and that, accordingly, petitioners' conduct affected commerce within the meaning of the Act (R. 54). The Board further found that, although the strike was called on August 21, 1947, the day before the effective date of Section 8 (b) (4) (A) of the Act, it was continued on and after August 22, 1947, the effective date of said section of the Act (R. 56-57). The Board concluded therefore, that on and after August 22, 1947, petitioners engaged in conduct in violation of Section 8 (b) (4) (A) of the Act (R. 57).

III. The Board's Order

The Board ordered petitioners to cease and desist from engaging in, or inducing the members of Local 74 to engage in, a strike or concerted refusal in the course of their employment to perform services for any employer, where an object thereof is to require any employer or other person to cease doing business with Watson, and to post the customary notices of compliance (R. 59).

IV. The Decision Below

On April 4, 1950, the court below handed down its opinion (R. 187-196) and entered its decree (R. 199) granting the Board's petition for enforcement of its order (R. 1-3).

The court held that petitioners had engaged in activities proscribed by Section 8 (b) (4) (A) against a concern, Watson, a part of whose business was conducted in interstate commerce and that therefore petitioners' unfair labor practices affected commerce within the meaning of the Act. The court below also held that since the unfair labor practice found by the Board consisted of petitioners' conduct in continuing in effect, after the effective date of the Act, their order to employees to go out on strike, and not in issuing the order before that date, the Act was not being given a retroactive application. The court further held that the Board's order to cease and desist from engaging in conduct violative of Section 8 (b) (4)

(A) was directed against petitioner union and its agents and not against the individual members of the union and therefore did not infringe any constitutional privilege, including the privilege against involuntary servitude. Finally, the court held that the order of the Board had not been rendered moot by reason of the completion of the Stanley residence.

SUMMARY OF ARGUMENT

I

A. The Board properly found that petitioners engaged in secondary strike action in violation of Section 8 (b) (4) (A). The strike was directed against a neutral, Stanley, and an object thereof was to force or require Stanley to cease doing business with Watson, the primary employer. That the strike was undertaken pursuant to petitioner union's rules, and therefore may also have had other objects, does not establish its legality. If *an* object of the strike, not necessarily the sole or principal object, was to force a cessation of business between Watson and Stanley, the strike falls within the prohibition of the Act. Nor is it significant that petitioners' object may have been to force Stanley to discontinue using only Watson's services, and not its products. The Act protects business relationships which involve only the furnishing of services, as much as it protects business relationships which involve only the purchase of goods.

Petitioners' claim that Stanley's business dealings with Watson violated an "all union" contract between Stanley, Parker and the union, and therefore gave rise to a primary dispute between the union and Stanley, is without merit. The record does not establish that Stanley had made any such agreement either with Parker or with the union.

B. The Board's findings and order do not give the Act retroactive application. The Board's findings rest entirely upon petitioners' continuation of the strike, and their failure to rescind the strike order, after the effective date of the Act. The order requires only that it be rescinded. That the strike order may initially have been lawful, because issued prior to the effective date of the Act, did not guarantee that continuation of the order after the effective date of the Act would be lawful.

II

The Board properly found that petitioners' unfair labor practices affect commerce within the meaning of the Act. Secondary boycotts are intended to and do curtail not only the business of the secondary employer but also the business of the primary employer. Thus, if the business of either employer affects interstate commerce the jurisdiction of the Board over the secondary boycott is clear.

It is immaterial that the boycott of a particular secondary employer may not affect the primary

employer's business substantially; for if strikes against those who do business with the primary employer were "multiplied into a general practice" (*Mandeville Island Farms, Inc.*, v. *American Crystal Sugar Co.*, 334 U.S. 219, 236), the effect on the primary employer's business would unquestionably be substantial. Under familiar principles, there need be no showing in "individual cases" of "any specific effect upon interstate commerce." *Mandeville Island Farms case, supra.* Nor is it material that the specific activity immediately affected by the boycott, in these cases building construction, may be "local" in character. In secondary boycott cases particularly, the decisive consideration is not "how local the operation which applies the squeeze" but whether "it is interstate commerce that feels the pinch." *United States* v. *Women's Sportswear Association*, 336 U.S. 460, 464.

In the instant case, as well as in the *Langer* and *Denver* cases, Nos. 108 and 393, this Term, the primary employers were engaged in interstate commerce, and the secondary boycotts which were directed against them were therefore subject to the Board's jurisdiction. The fact that the volume of interstate business done by each of the employers in the *Langer* and *Denver* cases was small is "not enough to remove [them] from the scope of federal regulation where, as here, [their] contribution, taken together with that of many others similarly situated, is far from trivial". *Wickard* v. *Filburn*,

317 U.S. 111, 127-128. The building construction industry is one of those which "though conducted by relatively small units, contribute in the aggregate a vast volume of interstate commerce." *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601, 607. Congress intended in the Act to extirpate unfair labor practices "so far as its power could reach" (*National Labor Relations Board* v. *Hearst Publications, Inc.*, 332 U.S. 111, 125), and the legislative history clearly shows that Congress specifically intended to subject secondary boycotts in the building construction industry to federal regulation. See 93 Cong. Rec. 4132, 4198, *Leg. Hist.* pp. 1056, 1107).

The circumstance that the Board has declined to exercise jurisdiction in some construction industry cases does not invalidate its exercise of jurisdiction in the instant and companion cases. The action of the Board in declining to exercise jurisdiction in particular cases has been based upon considerations of administrative policy, not of constitutional or statutory power. If the Board has in these cases acted within the scope of its authority, its refusal in other cases to exert that authority to its maximum is without significance.

III

The Act and the order are directed against labor organizations and their agents, not against employees. Labor organizations and their agents are en-

joined from engaging in proscribed secondary strike action. Neither the statute nor the order requires any employees to work, or requires the union to order them to do so. The statute expressly guarantees to individual employees the right to quit work for any or no reason. Therefore, neither Section 8 (b) (4) (A) nor the Board's order based thereon may be said to contravene the constitutional prohibition against involuntary servitude.

IV

The fact that work on the Stanley residence has been completed does not render the Board's order moot. The danger that petitioners might resort to illegal secondary boycotts against Watson in the future suffices, under established principles, to sustain the order.

ARGUMENT

I

THE BOARD PROPERLY FOUND THAT PETITIONERS' STRIKE AGAINST STANLEY WAS DESIGNED TO FORCE OR REQUIRE STANLEY TO CEASE DOING BUSINESS WITH WATSON, AND THEREFORE VIOLATED SECTION 8 (b) (4) (A) OF THE ACT

A. THE BOARD'S FINDING THAT PETITIONERS ENGAGED IN SECONDARY STRIKE ACTION WITHIN THE MEANING OF SECTION 8 (B) (4) (A) IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The record shows clearly (*supra*, pp. 8-9), as the Board found (R. 54-55, 56-58), that petitioners

ordered the union carpenters employed at the Stanley residence to go out and remain on strike. It is also clear from the record, as the Board found (R. 55), that an object of the strike was to force or require Stanley to cease doing business with Watson. As set forth in the Statement (*supra*, pp. 5, 8), petitioner Henderson, in March 1947, solicited Watson's installation employees to join Local 74. When they refused to join, he endeavored to persuade Watson to sign a closed-shop contract although none of Watson's employees was a member of Local 74. Upon Watson's refusal to do so, Local 74 began to picket Watson's store and otherwise publicize the unorganized status of Watson's employees.[3] While the picketing continued, Henderson applied secondary pressure against Watson, by ordering the carpenters employed by Parker to cease working on the Stanley residence because Watson's employees were employed there. At that time, Henderson told Stanley that if he would cancel his contract with Watson, the union carpenters would be permitted to go back to work.

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[3] The Board found that (R. 16, n. 11): "• • • beginning in about July and continuing until well into October 1947, Local 74 ran advertisements in the Labor World (a weekly newspaper owned by the Central Labor Union which was sent to all AFL union members in the Chattanooga area, and a few subscribers, but which was not sold to the general public) naming local firms who employed members of Local 74 for installation work, and stating that Watson's employed non-union labor for this type of work. At the bottom of the advertisement which started in September appeared the statement, 'Do not be deceived by Watson's claim that this statement [sic] is not part of our craft' • • •."

In these circumstances the fact that the strike was called and continued in effect pursuant to petitioner union's rules which prohibit union members from working on a job when non-members are employed (R. 105, 123, 130-131, 134), cannot disguise the fact that *an* object of the strike was to force Stanley to cease doing business with Watson. As we have shown in our Brief in the *Denver* case, No. 393, pp. 43-45, it is immaterial under the statute that the strike may also have had other objects. Petitioners argue, however, that (Br. 34, R. 40-42) since they were at all times willing to permit Stanley to use Watson's materials provided they were installed by members of the Union, it cannot be said that an object of the strike was to force or require Stanley to cease doing business with Watson. This contention overlooks the fact that that portion of the contract between Stanley and Watson which called for installation of the wall coverings constituted as much a part of the "business" between them as that portion which dealt with the furnishing of materials.[4] The "doing business"

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[4] The record affords no support whatever for petitioners' claim (Br. 34-35, 40-41) that Watson's purpose in refusing to sell the materials to Stanley without contracting also for the installation was anti-union. On the contrary, at the time the agreement was made with Stanley, Watson's generally refused to sell material outright, because of the scarcity of materials (R. 84, 85, 86). Indeed, the references to the Union by Smith of Watson's and Stanley, to which petitioners advert (Br. 35, 41), were not even made until Parker had objected to the proposed contract on the ground that the union would strike if it were consummated (R. 139-140).

clause of Section 8 (b) (4) (A) is completely comprehensive; it protects business relationships which involve only the furnishing of services, just as it protects business relationships which involve only the furnishing of goods. A secondary strike to force discontinuance of either type of business relationship is therefore illegal. (See Brief for the National Labor Relations Board in the *Denver* case, No. 393, this Term, pp. 63-64).

There is also no question in the instant case that the strike action was secondary. Parker's employees did not cease work as an incidental consequence of picketing directed solely at Watson's employees. Cf. Brief for the National Labor Relations Board in No. 393, pp. 23-38. Rather, petitioners conducted a strike among Parker's employees, thereby exerting pressure against Parker, a neutral employer, as well as against Stanley, also a neutral, in direct contravention of Section 8 (b) (4) (A).

Petitioners insist, however, throughout their brief (p. 10, *et passim*), that the strike resulted from a primary dispute between them and Stanley and that, for this reason, the strike was not secondary. This dispute, according to petitioners, arose from Stanley's breach of an alleged agreement with Parker, the contractor, that the job was to be "an exclusively union job." Petitioners refer to this alleged agreement as a "cost plus union contract" (Br. 2), and later in their brief (pp. 30, 29), assert that the all-union provision was "a collective bargain * * * an act and result of collective bargain-

ing." Petitioners also assert (Br. 44) that the all-union provision "had been originally agreed to by Stanley, Parker, and the Union." Even assuming, *arguendo*, that the agreement between Parker and Stanley contemplated the employment of only union men, the record contains no support whatever for the claim that the Union was, in any sense, a party to such agreement, or that the agreement was, in any sense, a "collective bargaining" contract. Petitioners do not document these assertions by even a single reference to the record. But even more significant is the fact that the record affords no warrant for petitioners' claim that there was an agreement between Stanley and Parker which required the employment of union men only on the project.[5] Petitioners rest their position entirely upon a truncated excerpt from Stanley's testimony, which omits the critical qualification which Stanley added. Stanley testified that in remonstrating with petitioner Henderson, he declared (R. 96):

> I put up as good a plea as I could to show why I needed to get in the house, and told them I wanted Union men and had always enjoyed having Union men working, preferred them because I thought their work was better, and that Parker—it was my understanding with

[5] This contention is an obvious afterthought. No such contention was advanced by petitioners in their numerous exceptions to the Intermediate Report, which detailed, *inter alia*, nine factual findings which the Trial Examiner allegedly erred by failing to make (R. 42-43). Compare Section 10(e) of the Act.

> Parker that Union men were going to do the work, *and that I certainly didn't mind having Union men do it if I could possibly find material for my floor covering and walls* [i.e., suitable material which the seller would not insist on installing himself].

Throughout petitioners' brief the comma which appears after the word "work" in the foregoing quotation is replaced by a period, and the succeeding portion, which we have italicized, is entirely omitted. Clearly, the foregoing testimony, as it appears in the record, will not support the claim that Stanley had agreed with Parker that, whatever circumstances might develop, the job was to be all union. On the contrary, the testimony shows that if Stanley could not obtain suitable floor and wall coverings from union sources, as later proved to be the case, he would be free to use non-union sources. This is confirmed by the fact that when it appeared that Stanley could not obtain suitable wall coverings except at Watson's, Parker himself suggested that Stanley have Watson's men perform their work when Parker's employees were not on the job, and thereby possibly avoid a strike by Parker's employees (R. 92, 142, 183-184). Parker was present when Watson's men came on the job and "helped get them started" (R. 91, 99, 111). Accordingly, the Board found (R. 18, 19, 32, 51), consistent with Stanley's testimony (R. 99), that the agreement between Stanley and Watson was made "with Parker's implied consent" and performed "with Parker's approval." Nothing in the testi-

mony of Henderson or Parker, or in the written agreement between Stanley and Parker, lends support to petitioners' position. The written agreement makes no provision for the exclusive employment of union men; neither Parker nor Henderson claimed that there was a supplementary agreement of this character. Indeed, Henderson, testifying to his conversation with Stanley, merely reported (R. 128) that the latter had stated to him that "he had a brother that was a member of a union; he was in sympathy with the Union." And Parker testified that the nub of his "controversy" with Stanley was that his union men, presumably because of their union rule, would not work with Watson's non-union workmen (R. 142-143).

Petitioners also urge (Br. 26-28) that the proviso to Section 8 (b) (4) immunizes the strike against the prohibition of Section 8 (b) (4) (A).[6] But the proviso on its face protects only refusals of employees to render services to employers *other* than their own, and hence can have no application here where the employees refused to render services to their own employer.

B. THE BOARD PROPERLY FOUND THAT BY CONTINUING THE STRIKE AFTER THE EFFECTIVE DATE OF THE ACT PETITIONERS VIOLATED SECTION 8 (B) (4) (A)

Petitioner instituted the strike among Parker's employees on August 21, 1947, the day before Section 8 (b) (4) (A) became effective, by ordering

[6] The proviso is discussed in our brief in *International Rice Milling Co.*, No. 313, this Term, pp. 66-81.

Parker's employees to cease work. The record shows, and the Board found (*supra*, pp. 8-9), that this strike order was neither rescinded nor revoked after the effective date of the Act. Indeed, petitioners admit that the strike order remained fully operative after that date. Had Parker's employees openly returned to work after the effective date of the Act they would have been violating the rules of the Union which, after that date, as before, prohibit union members from working on a job where non-union men are employed.

Since the strike order was issued prior to the effective date of Section 8 (b) (4) (A), the Board did not find that petitioners' conduct in issuing the order violated the Act. The Board found that petitioners violated the Act only by continuing the secondary strike after the effective date of the Act. And, as we have shown, the evidence abundantly supports the Board's finding that petitioners did continue the strike after August 22, 1947.

Petitioners contend, however (Br. 43-46), that since the strike resulted from an order issued prior to the effective date of the Act, and occurred pursuant to union rules adopted before that date, the Board's order gives to the Act retroactive application in contravention of Section 102 thereof.[7]

[7] Section 102 provides in pertinent part that "No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice thereto, * * *."

But the Board did not find that petitioners' action in calling the strike on August 21, was unlawful, nor did it hold unlawful petitioners' application, prior to August 22, of the union rule. The Board's finding rests entirely upon petitioners' failure, after the effective date of the Act, to rescind the strike order, and upon their continued application of the rule as a means of exerting secondary pressure of the kind condemned by the statute. That a particular course of conduct is lawful when initiated does not perpetually guarantee its continued legality. Once acts or omissions are made unlawful by statute, the outlawed conduct, though previously lawful, must cease. Obviously, persistence in conduct after it has been made unlawful is illegal; to find it such is to give prospective, not retroactive application to the statute. *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. 2d 134 (C. A. 4), certiorari denied, 302 U. S. 731; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 342; *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U. S. 86, 107-108.

II

THE BOARD'S FINDING THAT PETITIONERS' UNFAIR LABOR PRACTICES AFFECT COMMERCE WITHIN THE MEANING OF THE ACT IS VALID

Section 10 (a) of the Act empowers the Board to prevent the commission of unfair labor practices which affect commerce. Section 2 (7) of the Act defines the term "affecting commerce" to

mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." Congress in the Act thus "left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress." *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 648.

This Court, in a series of cases, has laid down the controlling principles which govern the Board's jurisdiction. It has long been established that the applicability of the Act turns on whether a stoppage of business operations resulting from industrial strife attributable to unfair labor practices might tend to impede or disrupt the free flow of goods in their normal channels in interstate commerce. *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 41-42.

De minimis aside, application of the Act does not depend upon the volume of commerce which might be affected by such stoppage. "The language of the National Labor Relations Act seems to make it plain that Congress has set no restriction upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the

volume of interstate commerce involved. * * * Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it be great or small. Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which the courts would apply the maxim *de minimis.*" *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, 606-607. Accord: *Santa Cruz Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453, 467.

The regulatory scheme of the Act extends to enterprises, no matter how "local" their activities may be, if interruption or cessation of those activities would adversely affect interstate commerce. "Congress in order to protect interstate commerce from adverse effects of labor disputes has undertaken to regulate all conduct having such consequences that constitutionally it can regulate. * * * Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce." *Polish National Alliance* v. *National Labor Relations Board,* 322 U. S. 643, 647-648.

Finally, exemption from the applicability of the Act may not be obtained by focusing attention exclusively upon the effects of the single practice involved in the particular case. "Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Polish National Alliance* case, *supra*, p. 648; cf. *Wickard* v. *Filburn*, 317 U. S. 111, 128.

These basic principles, which are applicable not only to the National Labor Relations Act but also to other statutes, like the Sherman Act, have recently been reiterated by this Court. In *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, the Court said (pp. 234, 236):

> * * * the inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented. For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate com-

> merce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence.
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> * * * * *
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> Congress' power to keep the interstate market free of goods produced under conditions inimical to the general welfare * * * may be exercised in individual cases without showing any specific effect upon interstate commerce, *United States* v. *Walsh*, 331 U. S. 432, 437-438; it is enough that the individual activity when multiplied into a general practice is subject to federal control, *Wickard* v. *Filburn, supra* [317 U. S. 111], or that it contains a threat to the interstate economy that requires preventive regulation. *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 221-222.

In *United States* v. *Women's Sportswear Association*, 336 U. S. 460, 464, the Court said:

> The source of the restraint may be intrastate * * *; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

The unfair labor practice with which we are here concerned is the secondary boycott, effectuated through strikes and work stoppages among

employees of secondary employers. The effects of that practice on interstate comerce provide the touchstone of its amenability to Congressional regulation. Inherently, the secondary boycott is intended to and does curtail not only the business of the secondary employer, but also the business of the primary employer, who is the union's ultimate target. Hence, if either the secondary or the primary employer is engaged in operations which affect interstate commerce, practices like secondary boycotts which tend to curtail those operations are within reach of the federal Act.

In the instant case it is Watson, the primary employer, who, as the Board found (R. 52) without challenge by petitioner, is engaged in interstate commerce. Watson is a large chain store operator who does business in several states.[8] The specialty store immediately involved in the instant case purchases and sells substantial quantities of supplies and goods across state lines. The secondary boycott initiated by petitioners against Watson manifestly presented a threat to the substantial interstate operations of the specialty store.

It is immaterial, of course, that the specific activities before the Board, *i.e.*, the secondary strike at the Stanley residence, might not, of itself, exert a substantial adverse affect upon Watson's business, for there need be no showing in "in-

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[8] The record does not disclose the extent of the interstate operations of Watson's entire chain system.

dividual cases" of "any specific effect upon interstate commerce." *Mandeville Farms* case, *supra; Polish National Alliance* case, *supra; Wickard* v. *Filburn*, 317 U. S. 111, 128. It is sufficient that if secondary strikes against customers of Watson were "multiplied into a general practice," Watson's interstate business would be adversely affected. *Ibid.* The Board expressly found in the instant case that proliferation of secondary strike pressure against other customers of Watson may reasonably be anticipated (R. 53). The threat to Watson's interstate operations thus presented by petitioners' activities fully meets the established test of the Act's coverage.[9]

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[9] The circuit courts of appeals in situations comparable to the instant case have uniformly upheld the Board's jurisdiction. *United Brotherhood of Carpenters and Joiners of America* v. *Sperry*, 170 F. 2d 863 (C. A. 10); *National Labor Relations Board* v. *United Brotherhood of Carpenters and Joiners of America*, 184 F. 2d 60 (C. A. 10), pending on petition for certiorari, No. 387, this Term; *Slater* v. *Denver Building & Construction Trades Council*, 175 F. 2d 608 (C. A. 10); *International Brotherhood of Electrical Workers, Local 501* v. *National Labor Relations Board*, 181 F. 2d 34 (C. A. 2), certiorari granted, No. 108, this Term; *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, — F. 2d — (C. A. D. C.), certiorari granted, No. 393, this Term; *Shore* v. *Building & Construction Trades Council*, 173 F. 2d 678 (C. A. 3). The decision of the Court of Appeals for the Tenth Circuit in *Groneman* v. *International Brotherhood of Electrical Workers*, 177 F. 2d 995, does not represent a departure from the principles discussed above. There, the union, in order to compel one Engle, a non-union sub-contractor working on a schoolhouse, to employ union electricians, picketed the construction site. As a result of the picketing the union employees of Groneman who were performing the carpentry work on the project stopped working. Groneman had caused to be shipped to the site $6000 worth of materials in interstate commerce. Groneman brought action against

It will not do, as the court below aptly stated, to view the controversy as if it were merely one between petitioners and the secondary employer, Stanley, whose operations were entirely local, for such a view ignores the Board's finding that the secondary boycott was directed against Watson, a concern which was engaged in interstate commerce. The National Labor Relations Act, like the Sherman Act, "is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Farms* v. *Sugar Co.*, 334 U. S. 219, 236. "The injury, and hence the power, does not depend upon the fortuitous circumstance that the particular person conducting the intrastate activities is, or is not, also engaged in interstate commerce." *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 121. In secondary boycott cases particularly, the critical consideration is not "how local the operation which applies the squeeze," but whether "it is interstate commerce that feels the pinch," *United States* v. *Women's Sportswear Association, supra; Local 167* v. *United States*, 291 U. S. 293, 297. That petitioners intended Watson's

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the union under Section 303 of the Act which provides for private suits for damages arising from secondary boycotts as defined therein. The Court of Appeals dismissed the action for the reason that the effect of the union activities on commerce was *de minimis*. The alleged secondary boycott was not directed against Groneman and it affected the latter's operations merely incidentally in the one instance; hence the union's action, unlike the action of petitioners against Watson, presented no general threat against the continuing interstate operations of Groneman.

to feel the pinch and that their unlawful conduct therefore "contains a threat to the interstate economy that requires preventing regulation" (*Mandeville* case, *supra*), is thus beyond question.

The foregoing analysis also serves to demonstrate the validity of the Board's exercise of jurisdiction in the *Langer* case, No. 108, this Term, and in the *Denver* case, No. 393, this Term. In the *Langer* case (See Brief for the National Labor Relations Board, in No. 108, This Term, pp. 5-6), Langer, the primary employer was engaged in interstate commerce within the meaning of the Act. In the course of his business, Langer purchased quantities of materials from states other than New York where his business establishment was located. In addition, Langer performed work in Connecticut and in connection therewith transported in interstate commerce quantities of material and supplies. Although the materials purchased by Langer or transported by him in interstate commerce were not large in volume, it cannot be said that they fall into a *de minimis* classification. Secondary strikes among contractors who do business with Langer would therefore cripple interstate operations which are protected by the Act. Moreover, the construction project which was the immediate subject matter of the controversy in that case was itself interstate in character, being performed by New York con-

tractors, including Langer, at a Connecticut site.[10]

In the *Denver* case (See Brief for the National Labor Relations Board in No. 393, this Term, pp. 4-5), the primary employer, Gould & Preisner, also purchased and caused to be transported in interstate commerce, substantial quantities of materials. During the year immediately preceding the commission of the unfair labor practices found by the Board, the firm purchased raw materials valued at $86,500, of which 65 percent was purchased and shipped directly from more than forty firms located outside the State of Colorado where Gould & Preisner was engaged in business.

In the *Langer* and *Denver* cases, as in the instant case, the secondary boycotts were intended to affect the business of the primary employers as well as the secondary employers. In all of these cases, if secondary strike pressures were exerted against

[10] In the *Langer* case, two of the three Board members who concurred in holding that the Union had violated Section 8 (b) (4) (A) were of the view that the Board was warranted in asserting jurisdiction on the basis of the threatened effect on Langer's interstate operations. (R. 296); the third member of the majority was of the opinion that the Board had jurisdiction in the case because the very controversy before the Board arose out of an interstate transaction, in which New York contractors were engaged in the construction of a residence in Connecticut (*id.*). The two members constituting the minority thought that the Board should not, as a matter of discretion, assert its jurisdiction in the case because the "operations involved * * * constitute an essentially local enterprise * * *." (R. 299.)

The Court of Appeals for the Second Circuit was of the opinion that Langer's interstate operations alone sufficed to support the Board's jurisdiction. In addition, that court also pointed out that Langer performed substantial amounts of work for various enterprises whose own interstate activities were substantial. (R. 325-326.)

all or any substantial number of concerns who do business with the primary employer their business would be sharply curtailed, if not destroyed. And, in the *Langer* and *Denver* cases, no less than in the instant case, the danger of such multiplication of secondary strike pressures is very real."

The fact that in all of these cases both the primary and the secondary employers were engaged in the building construction industry, an industry which the unions regard as "local" does not suffice to put the secondary boycotts "beyond reach of Congress' authority or of the statute." *Mande-*

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[11] The record in the *Langer* case (R. 109-110) discloses that the union threatened to picket a construction site of the Middletown Recreation Center, Inc., if the latter engaged Langer to perform the electrical work. Although the Board found this threat not to be violative of the ban against inducement of employees to engage in strike action prohibited by Section 8 (b) (4) (A), since it was addressed to an official of that company, and therefore not to an employee within the meaning of that Section (R. 260, 263-265, 298-299), "the incident serves to underscore the threat implicit in the union's action against all of Langer's operations.

In the *Denver* case the record discloses (R. 139-144) that the Council and two of its affiliates, the Electricians and the Carpenters, approached another contractor on a different project than the Bannock Street building, where Gould & Preisner also had a subcontract for some electrical work. After representatives of the three organizations voiced dissatisfaction over the presence of Gould & Preisner on the project, the Carpenters ordered one of its members off the job. The Board dismissed the complaint insofar as it alleged that this action was violative of Section 8 (b) (4) (A) on the ground that (R. 259-260) the withdrawal of the services of a single employee did not constitute strike action within the meaning of that Section. The incident nevertheless illustrates the likelihood of the union's extending the boycott to other concerns engaging the services of Gould & Preisner and the threat implicit therein against the continued movement of material to that firm in interstate commerce.

ville Farms v. *Sugar Co.*, 334 U. S. 219, 229. Certainly, the activities of these employers are no more local than was the growing of sugar beets involved in the *Mandeville* case, the consumption of home-grown wheat involved in the *Wickard* case, the sale of drugs by a retail druggist involved in *United States* v. *Sullivan*, 332 U. S. 689, and the stitching of unfinished garments by stitching contractors involved in *United States* v. *Women's Sportswear Ass'n.*, 336 U. S. 460. As was true of the activities involved in the *Mandeville* and *Wickard* cases, the impact of the building construction industry upon interstate commerce is undeniably huge.[12] It is that impact, not the character of the activities themselves, which is controlling.[13] *Wickard* v.

[12] In 1946, the total value of new construction activities in the United States was in excess of ten billion dollars. Indicative of the interstate movement of goods and materials that occurs in connection with the industry's operations is the fact that in that year six states accounted for 67% of the copper production of the country but accounted for only 33% of construction activity; six states accounted for 66% of the lead production of the country but only 34% of construction activity; thirteen states accounted for 64.4% of the lumber production but for only 25.6 of the Construction Activities. These statistics appear at pp. 215, 217-219, 223 of the record in the *Langer* case and are compiled and computed from U. S. Dept. of Commerce, Bureau of Foreign and Domestic Commerce, Construction Division, *Dollar Construction Estimates, 1915-1946*, p. 36. Also of significance is the fact that in 1939, of the total construction work in that year, 15.2% ($688,659,000) was performed by contractors outside their home states. *Langer* record, p. 221.

[13] Petitioners' reliance (Br. 51-54) upon early cases construing the Sherman Act and other legislation which stress the character of the activities involved rather than the impact of those activities on interstate commerce is misplaced. Petitioners' argument "is a reversion to conceptions formerly held but no longer effective to restrict either Congress' power

Filburn, 317 U. S. 111, 123; *Mandeville Farms* v. *Sugar Co.*, 334 U. S. 219, 229-235.

Nor does the fact that the business of each of the building contractors is small, and thus, if taken alone, may be said to affect interstate commerce but slightly, bar the power of Congress or the application of the statute. "That appellee's own contribution * * * may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Wickard* v. *Filburn*, 317 U. S. 111, 127-128; cf. *United States* v. *Darby*, 312 U. S. 100, 123; *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178, 183.

The building construction industry is in large part composed of small units like Langer and Gould & Preisner.[14] The record in the *Langer* case illu-

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Wickard v. *Filburn*, 317 U. S. 111, or the scope of the Sherman Act's coverage," *Mandeville Farms* v. *Sugar Co.*, 334 U. S. 219, 229.

[14] In 1939, the latest date for which statistics are available, the total number of establishments in the construction industry was 215,050. Of this number, 87.2% did less than $25,000 worth of work. The total number of special trade contractors (*i.e.*, contractors who contract for and are primarily engaged in a specialized trade such as plumbing, painting, carpentry, etc.) was 162,067. Of this number, 75.4% were doing less than $25,000 worth of business. The total value of construction work performed by this group of special trade contractors amounted to $829,680,000, or 18.4% of the total value of work performed in the construction industry. This data which appears at p. 220 of the record in the *Langer* case, is compiled and computed from U. S. Department of Commerce, Bureau of the Census, Census of Business, 1939, Volume IV, *Construction*, 1939, 1943, pp. 6, 12, and 17.

trates how closely the operations of such contractors are intertwined with the movement of large masses of goods across state lines. See Brief for the National Labor Relations Board in No. 108, this Term, pp. 4-6. Langer himself, as well as Giorgi and Deltorto who were also engaged in the construction of the Greenwich house, purchased substantial quantities of materials from concerns engaged directly in interstate commerce. Those concerns in turn purchased large quantities of materials which were shipped from other states and resold these materials to numerous customers such as Langer. Hence, as the Trial Examiner pointed out in that case (R. 252-253), although the value of materials used in any particular project, such as the Greenwich house, may not be large, the construction of such a project is "embedded in a network of commercial relationships" involving contractors like Langer, Giorgi and Deltorto, and their respective suppliers, "which relationships, in their ramifications * * * manifestly affect commerce * * *." Moreover, builders, like Langer, often do construction work for firms engaged directly in interstate commerce. (Brief for the National Labor Relations Board in No. 108, p. 6.) Manifestly, if secondary boycotts against firms like Langer, Gould & Preisner, etc., could be effectuated through strikes against their suppliers, customers and others who do business with them, a huge

volume of interstate commerce would suffer. The building construction industry is thus one of the industries to which this Court's observations in the *Fainblatt* case, 306 U. S., at pp. 607-608, are clearly applicable:

> There are not a few industries in the United States which, though conducted by relatively small units, contribute in the aggregate a vast volume of interstate commerce. Some * * * are extensively unionized and have had a long and tragic history of industrial strife. It is not to be supposed that Congress, in its attempted nationwide regulation of interstate commerce through the removal of the causes of industrial strife affecting it, intended to exclude such industries from the sweep of the Act.

The legislative history shows beyond question that Congress did not intend to exclude the building construction industry from the sweep of the secondary boycott provisions of the Act. One of the express purposes of the Congressional sponsors of the legislation was to rid the building trades of the bane of secondary boycotts and jurisdictional strikes. The case most often referred to in the course of debate as the classic example of a secondary boycott which the Act was designed to render unlawful was *Allen Bradley Co.* v. *Local Union No. 3, I. B. E. W.*, 325 U. S. 797, a building con-

struction industry case.[15] Another case which was discussed as illustrative of the abuses which the Act was intended to reach was the refusal of AFL unions to install neon signs because the signs bore the label of the CIO (93 Cong. Rec. 4132, Leg. Hist. p. 1056). In discussing the jurisdictional strike provisions of the Act sponsors of the legislation emphasized that the jurisdictional strike was prevalent "particularly in the building trades" and that the disputes affected the use of steel "in the building of homes and offices" (*ibid.*). In view of Congress' observation that potentially the secondary boycott can create "a chain reaction that will tie up the entire United States in a series of sympathetic strikes" (93 Cong. Rec. 4198, Leg. Hist. p. 1107), it is idle to argue that Congress was oblivious to and unconcerned with the consequences of secondary boycotts in the building construction industry upon the national economy.[16]

[15] See, *e.g.*, S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 22; 93 Cong. Rec. 4132, 4199, 5011, reprinted in *Legislative History of the Labor Management Relations Act, 1947* (Gov't. Print. Off., 1948), pp. 428, 1056, 1107, 1491.

[16] Petitioners' assertion (Br. 50-51) that the Act was not intended to have application to "local" construction jobs or to a "local building union performing a local job" is based upon the statement of Senator Taft appearing in the *New York Journal-American* of July 7, 1947, that "the construction industry ordinarily would be intrastate commerce and would not be affected by the Act" and other statement by Senator Taft in *Collier's Magazine* of March 6, 1948, that he did not believe that Congress intended the ban against the closed shop contained in the Act to "extend to local building-trade unions whose work is, in fact, intrastate in character." Petitioners also rely (Br. 65) on the report of a legislative subcommittee issued after the passage of the Act dealing with the interpreta-

The views expressed by the Court of Appeals for the Third Circuit in *Shore* v. *Building and Construction Trades Council*, 173 F. 2d 678, at p. 681, summarize our position:

> All of this argument adds up to the conclusion that what affects the building industry in a given community affects interstate commerce and that the total effect of a $10,000,000,000 industry on interstate commerce is obviously very appreciable. One small stoppage may not have an immediately perceptible effect upon the flow of the whole stream. But many small stoppages will have such effect. And like the small amount of grain in *Wickard* v. *Filburn*, [317 U. S. 111], the power to regulate is not lost because of the small size of any individual contribution. We reach the conclusion that it cannot be denied that Congress may, through its power to regulate what affects interstate commerce, regulate labor practices in industries which are themselves dependent on interstate commerce. That Congress has done so in the Act regulating labor relations is established. There is no escape, therefore, from the answer that the power is there and Congress has chosen to exercise it.

In the light of all these considerations we submit that in asserting jurisdiction in the *Denver*

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tion, by the Board's General Counsel, of the term "affecting commerce." These relatively ambiguous statements were made after the Act was passed and form no part of its legislative history. Since, as petitioners' construe them, they are inconsistent with the understanding entertained by Congress at the time the Act was passed, they cannot establish that Congress did not reach secondary boycotts in the building trades.

case and the *Langer* case, no less than in the instant case, the Board acted within the scope of the authority delegated to it by Congress.

Cases arising under the Fair Labor Standards Act have no relevance here. In that statute Congress did not exert the full reach of its commerce power and plainly indicated its intention to exclude from the coverage of that statute "essentially local activities." Because of this express limitation, this Court has declined to bring within the scope of the statute and *"absorb by adjudication* essentially local activities that Congress did not see fit to take over by legislation." (Italics supplied.) *10 East 40th St. Co.* v. *Callus*, 325 U. S. 578, 582-583.

In the National Labor Relations Act, unlike the Fair Labor Standards Act, Congress manifested a purpose to regulate labor practices not only in firms which are engaged "in commerce" but also in those whose activities "affect commerce." In so defining the regulatory scope of the Act, Congress was not "indulging stylistic preferences" but manifesting its intention to exercise its plenary power over commerce and to regulate all activities which "in the interlacings of business across state lines adversely affect such commerce." *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 647-648.

The fact that Congress has chosen to regulate certain practices in the building construction in-

dustry which adversely affect interstate commerce does not mean that the line between matters of local and matters of national concern has been obliterated. That secondary boycotts in the building construction industry have impact on the movement of goods across state lines has been demonstrated, pp. 27-37, *supra*. As this Court has observed (*Polish National Alliance* case, *supra*, at pp. 650-651):

> * * * the old admonition never becomes stale that this Court is concerned with the bounds of legal power and not with the bounds of wisdom in its exercise by Congress. When the conduct of an enterprise affects commerce among the States is a matter of practical judgment, not to be determined by abstract notions. The exercise of this practical judgment the Constitution entrusts primarily and very largely to the Congress, subject to the latter's control by the electorate. Great power was thus given to the Congress: the power of legislation and thereby the power of passing judgment upon the needs of a complex society. Strictly confined though far-reaching power was given to this Court: that of determining whether the Congress has exceeded limits allowable in reason for the judgment which it has exercised. To hold that Congress could not deem the activities here in question to affect what men of practical affairs would call commerce, and to deem them related to such commerce merely by gossamer threads and not

by solid ties, would be to disrespect the judgment that is open to men who have the constitutional power and responsibility to legislate for the Nation.

Petitioners assert (Br. 61-64), however, that the Board in a series of decisions issued after its decisions and orders in the instant case and in No. 108, this Term, were handed down, has in effect tacitly recognized that it exceeded the scope of its authority in asserting jurisdiction in these construction industry cases. There is no foundation for this assertion. The Board has, it is true, declined to assert jurisdiction in several cases arising in the construction industry. But there is no suggestion in any of them that the Board was of the view that it could not, if it chose, have asserted jurisdiction there. On the contrary, the Board made it clear that its decision not to exercise jurisdiction in the particular cases there involved was based upon considerations of discretion, not of power. The Board's judgment did not turn upon whether Federal power under the commerce clause could be asserted in those cases, but only on whether the Board should, in the exercise of its administrative discretion to effectuate the policies of the Act, exercise this power.[17] The Board declined to exercise its jurisdiction in those cases, not because the affected employer's operations were so

[17] See *Building and Construction Trades Council and George Petredis and William S. Fryer*, 85 NLRB 241; *Walter J. Mentzer*, 82 NLRB 389.

unrelated to commerce as to preclude the Board's assertion of jurisdiction, but because the impact on commerce in the circumstances there disclosed was relatively slight and, on balance, did not seem to the Board to warrant exercise of its jurisdiction over the dispute. Summarizing its views the Board said (*Denver Building and Construction Trades Council*, 90 NLRB, No. 66):

> From the outset we have recognized and given effect to the legislative intent to proscribe certain unfair labor practices by labor organizations in [the building and construction] industry. In so doing, however, we did not then nor do we now regard Congress as having ordered this Board, in the building and construction industry, to cease to exercise a function inherent in the administrative process, i.e., to temper power with policy considerations in appropriate circumstances. Indeed, in the very cases cited by the dissent as the highwater mark of Board consistency with legislative intent, far from enunciating a rule of blanket jurisdiction, we set forth that it would accord with the intent of Congress and effectuate the policies of the amended Act to assert jurisdiction over cases involving the local construction industry, "*where interference therewith would have a substantial effect on interstate commerce*" (underscoring supplied).
>
> Consistent with this test, we have invoked our administrative discretion in this and related industries on a case to case basis, as-

serting jurisdiction where the facts pointed to a direct and substantial effect on commerce, though the operations involved were, in isolation, intrastate;[8] and declining to assert jurisdiction where the facts pointed to a remote and insubstantial effect on commerce.[9] Similarly, when confronted with essentially small or characteristically local enterprises, whatever the industry, the Board has refrained

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[8] *International Brotherhood of Electrical Workers, Local 501, A. F. of L. (Samuel Langer)*, 82 NLRB 1028, involving a small residence but with direct inflow of materials and contractors operating in more than one State; *Denver Building and Construction Trades Council, et al. (Earl C. Gould and John C. Preisner d/b/a Gould & Preisner)*, 82 NLRB 1195, involving small projects as to which the charging party's operations were slight, but the charging party's business in general depended upon a substantial direct inflow of materials; *Denver Building and Construction Trades Council, et al. (The Grauman Company)*, 87 NLRB, No. 36, involving the installation of a soda fountain in a local store, but directly affecting the operations in general of the charging party, itself in interstate commerce.

[9] *Building and Construction Trades Council of Pittsburgh, Pennsylvania, A. F. of L., et al. (George Petredis and William S. Fryer), supra*, involving a local theatre as to which the materials used by the contractors were purchased locally though originating in part outside the State with one insubstantial exception, and the charging party's business was relatively small; *Walter J. Mentzer, supra*, involving an apartment house as to which the materials used were purchased locally, though originating in part outside the State, and the charging party's business was relatively small; *Row Construction Company, supra*, involving small municipal buildings as to which the materials used were purchased locally, though originating in part outside the State, and the charging party's business was relatively small; *Denver Building and Construction Trades Council (B. W. Fellers, Inc.), supra*, involving a local contractor engaged principally in residential construction as to which virtually all the materials used were purchased locally, though originating in part outside the State.

> from asserting the Federal power where to do so, in its opinion, would exceed the bounds of wisdom and fail to effectuate the policies of the Act. [Some footnotes omitted]

Petitioners in the *Langer* case, No. 108, argue (Br. pp. 28, 31), that "it is difficult to distinguish the type of differences in practical judgment which are available to draw a line between rulings of law and administrative judgments that commerce is affected in too remote a sense to warrant the exercise of jurisdiction," and that therefore the Board's refusal to exert jurisdiction "requires the conclusion that the Congress did not intend to cover labor disputes of the local character here involved." But the differences, and their consequences, are very real. In a statute like this one, where Congress intended to extirpate unfair labor practices "so far as its power could reach" (*National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 125), a practical judgment that particular relationships are not to be regulated under the Act would, on petitioners' view, automatically remove such relationships from the area of federal power. The Board's practical judgment that although Congress authorized the Board to exercise jurisdiction it should refrain from doing so, has no such stultifying consequences insofar as the existence of federal power is concerned. Consequently, the Board is free to and does[18] make its

[18] See *Denver Building and Construction Trades Council*, 90 NLRB, No. 66.

policy judgements turn upon budgetary and staff considerations, factors which can play no part in a court's judgment as to the permissible reach of federal power. These considerations are inherently of a fluctuating nature and permit adaptation of the reach of the statute to the realities of both economic needs and administrative capacity.

The issue before this Court is whether the Board, in asserting jurisdiction in the instant and companion cases, has exceeded its authority under the statute or has acted within the permissible limits of that authority. In the light of the controlling principles laid down by this Court, that issue must, we believe, be resolved in favor of the Board. That the Board may have declined to exercise jurisdiction in other cases does not mean that the Board had no authority to assert jurisdiction here. Power is not extinguished by mere failure to exercise it. *United States* v. *American Union Transport*, 327 U. S. 437, 454-455; *United States* v. *Morton Salt Co.*, 338 U. S. 632, 647-648; *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 383 (C. A. 9). Nor does lack of consistency, if any, in its policy judgments invalidate the Board's exercise of jurisdiction in the instant and companion cases. Cf. *Virginian Railway* v. *United States*, 272 U. S. 658, 665-666; *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 775; *Securities and Exchange Commission* v. *Chenery Corporation, et al.*, 322 U. S. 194, 201-203; *Packard Motor Car Co.*

v. *National Labor Relations Board*, 330 U. S. 485.[19]

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[19] The Board recently announced the standards which will govern its exercise of jurisdiction in all future cases. Under these standards, announced in eight decisions of the Board, and summarized in a press release issued by the Board on October 6, 1950, the Board will exercise jurisdiction over:

1. Instrumentalities and channels of interstate and foreign commerce (for example, radio systems).
2. Public utility and transit systems.
3. Establishments which operate as integral parts of a multi-state enterprise (for example, chain stores, and branch divisions of national or interstate organizations).
4. Enterprises which produce or handle goods destined for out-of-state shipment, or performing services outside a state, if the goods or services are valued at $25,000 a year.
5. Enterprises which furnish services or materials necessary to the operation of enterprises falling into categories 1, 2 and 4 above, provided such goods or services are valued at $50,000 a year.
6. Any other enterprise which has:
   (a) a direct inflow of material valued at $500,000 a year; or
   (b) an indirect inflow of material valued at $1,000,000 a year; or
   (c) a combination inflow or outflow of goods which add up to at least a total of "100%" of the amounts required in items 4, 5, 6, (a) and (b) above.
7. Establishments substantially affecting national defense.

The instant case falls within category 3 of those standards. In Case No. 108, the Board probably would not in the present posture of the record in that case assert jurisdiction under its new standards. But this does not mean that enforcement of the Board's order in that case would have no practical significance. The order enjoins the union from exerting secondary economic pressure against Langer through any other person with whom he also does business. The operations of these other persons may, of course, in a particular case meet the jurisdictional criteria announced by the Board and any secondary strike pressure exerted through them against Langer would be violative of a decree enforcing the order.

It is asserted (Pet. Br. in *Langer* case, No. 108, this Term, p. 31) that the Board's policy decision not to exercise jurisdiction in cases involving relatively slight impact on commerce, gives rise to an anomalous result with respect to

III

THE BOARD'S ORDER DOES NOT IMPOSE INVOLUNTARY SERVITUDE

Petitioners assert (Br. 21-26) that if Section 8 (b) (4) (A) and the Board's order require the union's members to continue working on a project regardless of the presence of Watson's employees, the Act and the order infringe the constitutional privilege against involuntary servitude. The claim rests upon a misconception of the statutory provisions and the Board's order. The Act does not make it an unfair labor practice for employees to cease work for any purpose. The statute expressly safeguards the right of employees to quit work or to work on any terms which they themselves choose.[20] The limitations contained in Section 8

Section 303 (a) of the Act which gives private parties the right to sue for damages resulting from secondary boycotts in the Federal District courts. Under that section, it is argued, cases which are not deemed sufficiently close in their relationship to commerce to warrant exercise of the Board's jurisdiction might nevertheless be brought to the courts for decision. We fail to see how this result in any way requires the conclusion petitioner urges, that Congress did not intend to vest jurisdiction in the Board over such cases as the *Langer* case. Congress conferred upon the Board a broad discretion to effectuate the policies of the Act. In the exercise of this discretion the Board, for policy reasons, may properly decline to exert jurisdiction in cases where a district court in private litigation under Section 303 (a), having no similar discretion, may not decline to grant relief. The different result does not suggest a want of power in the Board, but merely that entirely different considerations may prevail in unfair labor practice proceedings before the Board than in private litigation in the courts.

[20] Section 502 of the Act provides:

"Sec. 502. Nothink in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to

(b) (4) (A) are imposed upon labor organizations and their agents and make it an unfair labor practice for them to engage in, or induce or encourage employees to engage in strike action for the stated object. The Board's findings and order are consistent with these limitations. The Board's findings that petitioners violated Section 8 (b) (4) (A) are predicated not upon the action of the union carpenters in refusing to work, but upon petitioners' action in bringing about that concerted refusal. The Board's order does not require any employees to return to work; it does not require that petitioners compel them to do so; it merely requires petitioners to revoke the strike order which keeps them from returning to work. Neither the Act, nor the Board's findings or order, therefore, impose involuntary servitude on petitioners or the employees. *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490; *International Union, U. A. W., A. F. of L., Local 232* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, 251. Accord: *National Labor Relations Board* v. *Wine, Liquor & Distillery Workers Union, Local 1, etc., A. F. of L.*, 178 F. 2d 584, 587-588 (C. A. 2); *International Brotherhood of Electrical Workers, Local 501, et al.* v. *National Labor Relations Board*, 181 F. 2d 34, 39-40

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make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

(C. A. 2). Cf. *National Labor Relations Board* v. *National Maritime Union of America*, 175 F. 2d 686, 692 (C. A. 2), certiorari denied, 338 U. S. 954; *Printing Specialties & Paper Converters Union, Local 388, A. F. of L.* v. *LeBaron*, 171 F. 2d 331, 334-335 (C. A. 9); *United Brotherhood of Carpenters & Joiners of America* v. *Sperry*, 170 F. 2d 863, 868-869 (C. A. 10).

IV

THE BOARD'S ORDER IS NOT MOOT

Petitioners assert (Br. 66-68) that because all work on Stanley's residence has been completed, the Board's order is now moot. This argument is but another aspect of petitioners' fallacious contention, discussed above, that their illegal secondary boycott should be regarded as involving only the neutral parties against whom it is immediately directed, and not Watson, the real party whom the union by these illegal tactics sought to reach.

As long as the basic dispute between petitioners and Watson remains unresolved, and petitioners do not even claim that it has been resolved, the danger remains that petitioners will resort to secondary boycotts against others who do business with Watson, to compel Watson to yield to their demands (R. 34, 53). It is against this danger that the Board's order is designed to guard, and that order is not rendered superfluous or unnecessary merely because the specific violation found has been

discontinued by petitioners, either voluntarily or because the opportunity to continue it in precisely the same fashion or context has disappeared. Indeed, even if the specific dispute between petitioners and Watson were resolved the Board's order would not thereby be rendered moot. The danger that petitioners might resort to illegal secondary boycotts against Watson should another dispute arise between them in the future would suffice to sustain the order. For it was Congress' view that "neither the administrative body nor the courts are required to assume * * * that the unlawful practice in question, even though presently terminated, will not be resumed in the future. If such practice is resumed there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings." H. Rep. No. 1371, 74th Cong., 1st Sess., p. 5 Cf. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217, 225; *National Labor Relations Board* v. *Pool Manufacturing Co.*, 339 U. S. 577, 581-582.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed and the Board's order enforced in full.

PHILIP B. PERLMAN,
Solicitor General.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
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National Labor Relations Board.

FEBRUARY, 1951.

APPENDIX

The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. Supp. III, 141 et seq.) are as follows:

SEC. 101. * * *

"FINDINGS AND POLICIES

"SECTION 1. * * *

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"DEFINITIONS

"SEC. 2. When used in this Act—

* * * * *

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

"UNFAIR LABOR PRACTICES

* * * * *

"SEC. 8. * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in,

a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer * * * or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * * *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

"LIMITATIONS

"SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

* * * * * *

EFFECTIVE DATE OF CERTAIN CHANGES

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto.

* * *

* * * * * *

SAVING PROVISION

SEC. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 85

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., AND JACK HENDERSON, INDIVIDUALLY AND AS AGENT FOR LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The Petition for a Writ of Certiorari in this case, like the petition in No. 108, this Term, poses the question whether the action of a union in calling a strike of its members employed on a construction job, because the owner thereof engaged the services of a subcontractor who employed non-union labor on the project, violates Section 8 (b) (4) (A) of the Act. For the reason stated in the Government's Memorandum in No. 108, which is being filed concurrently herewith, we believe that this question now warrants review by this

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Court, and we accordingly withdraw our opposition to certiorari with respect to this issue. It continues to be the Government's position that the other questions raised by the petition do not warrant review. See Brief for the National Labor Relations Board in Opposition, No. 85, this Term.

Respectfully submitted,

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Solicitor General.

DAVID P. FINDLING,
Associate General Counsel,
National Labor Relations Board.

SEPTEMBER 1950.

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Nos. 65, 146, 208.

In the Supreme Court of the United States

October Term, 1950.

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., AND JACK HENDERSON, Individually and as Agent for Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., *Petitioners*,

vs.

NATIONAL LABOR RELATIONS BOARD.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 501, A. F. OF L., AND WILLIAM PATTERSON, *Petitioners*,

vs.

NATIONAL LABOR RELATIONS BOARD.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

DENVER BUILDING AND CONSTRUCTION TRADES COUNCIL, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A. F. OF L., LOCAL 501, THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A. F. OF L., ET AL.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and District of Columbia Circuits.

BRIEF OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, DENVER BUILDING AND CONSTRUCTION TRADES COUNCIL, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 501, A. F. OF L., THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A. F. OF L., AMICI CURIAE.

[illegible]
Attorneys for Amici Curiae.

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In the Supreme Court of the United States

October Term, 1950.

Nos. 85, 108, 393.

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., AND JACK HENDERSON, Individually and as Agent for Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., *Petitioners*,

vs.

NATIONAL LABOR RELATIONS BOARD.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 501, A. F. OF L., AND WILLIAM PATTERSON, *Petitioners*,

vs.

NATIONAL LABOR RELATIONS BOARD.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

DENVER BUILDING AND CONSTRUCTION TRADES COUNCIL; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A. F. OF L., LOCAL 68; AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A. F. OF L., LOCAL NO. 3.

On Writs of Certiorari to the United States Courts of Appeals for the Second, Sixth and District of Columbia Circuits.

BRIEF OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, DISTRICT COUNCIL OF KANSAS CITY, MISSOURI, AND VICINITY, A. F. OF L., AND WALTER A. SAID, AS AGENT FOR UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, DISTRICT COUNCIL OF KANSAS CITY, MISSOURI, AND VICINITY, A. F. OF L., AS *AMICI CURIAE*.

United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City, Missouri, and vicinity, A. F. of L., and Walter A. Said, as agent for

United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City, Missouri, and vicinity, A. F. of L., have filed a petition for a writ of certiorari (No. 387, this Term) seeking review by this Court of a decree of the United States Court of Appeals for the Tenth Circuit (184 F. 2d 60) enforcing an order of the National Labor Relations Board issued against them (81 NLRB 802). A number of the questions presented by the petition for a writ of certiorari in No. 387, this Term, involve issues also presented in the instant cases. Since this Court has not yet acted upon the petition for a writ of certiorari in No. 387, this Term, but has set the instant cases for oral argument at an early date, the petitioners in No. 387, this Term, desire to safeguard against this Court deciding certain issues which might establish legal precedents contrary to their position without having before the Court their position. The petitioners in No. 387, this Term, have therefore requested and secured from counsel for each of the parties in the instant cases, consent to the filing by petitioners in No. 387, this Term, of a brief as *amici curiae* herein. The letters granting such consent have been filed with the clerk of this Court.

Opinions Below.

The opinion of the United States Court of Appeals for the Sixth Circuit in No. 85, this Term (R. 186-196), is reported in 181 F. 2d 126. The decision and order of the Board in that case (R. 51-61) are reported in 80 NLRB 533.

The opinion of the United States Court of Appeals for the Second Circuit in No. 108, this Term (R. 323), is reported in 181 F. 2d 34. The decision and order of the Board in that case (R. 295-300) are reported in 82 NLRB 1028.

The opinion of the United States Court of Appeals for the District of Columbia Circuit in No. 393, this Term (R. 265-281), is not yet officially reported. The decision and order of the Board in that case (R. 256-263, 211-247) are reported in 82 NLRB 1195.

Jurisdiction.

The petitions for writs of certiorari in Nos. 85, 108, and 393, this Term, were granted December 11, 1950 (340 U. S. 902).

Questions Presented.

This brief *amici curiae* will be limited to the following questions which are also presented by the petition in No. 387, this Term:

1. The question presented by all three cases of whether the alleged unfair labor practice under Section 8 (b) (4) (A) of the National Labor Relations Act, affects commerce within the meaning of Section 2 (6) and (7) of the Act, when the employer, whose employees on one small building job are allegedly induced to cease work, is not importing any goods from out of the state for use on that job.

2. The question presented by all three cases of whether Section 8 (b) (4) (A) of the Act makes it an unfair labor practice for a union to induce or encourage employees to cease working on, or making deliveries to, a building project where nonunion labor is being employed by one subcontractor.

3. The question presented by No. 108, this Term, of whether picketing, which constitutes merely the expression of views, argument or opinion and neither expressly nor impliedly threatens, is protected by Section 8 (c) of the Act or the First Amendment to the Constitution of the United States.

ARGUMENT.

I.

The unfair labor practices found do not affect commerce within the meaning of Section 2 (6) and (7) of the National Labor Relations Act.

The three instant cases (Nos. 85, 108, and 393, this Term) and the case in which *amici curiae* are petitioners (No. 387, this Term) each present the question of whether violation of Section 8 (b) (4) (A) of the National Labor Relations Act by inducing or encouraging employees of an employer engaged on a small building job to cease work affects commerce within the meaning of Section 2 (6) and (7) of the Act where that employer is not importing any goods from out of the state for use on the job. Three of the cases (Nos. 85, 108, and 387, this Term) involve small private residences: No. 85, the remodeling of a home; No. 108, the building of a home by conventional methods; No. 387, the erection of a "prefabricated" house. One case (No. 393, this Term) involves the erection of a small commercial building. In each case the alleged secondary employer, that is, the employer whose employees the Board found had been induced and encouraged in violation of Section 8 (b) (4) (A), did not import any goods directly from out-of-state sources:

In No. 85, the only employees who were induced to quit in alleged violation of Section 8 (b) (4) (A) were the carpenters. The Board deemed it unnecessary to determine whether the carpenters were employees of Stanley, the owner of the house, or Parker, the general contractor (80 NLRB, at 536, n. 9). Both Stanley and Parker were engaged in a purely local construction project and neither

imported any materials from across state lines (80 NLRB 533, 534-535, 544-545).

In No. 108, the Board found that the only employees who were induced to quit in alleged violation of Section 8 (b) (4) (A) were carpenters employed by Deltorto, the carpentry subcontractor (82 NLRB, at 1029, 1040-1041). The Board also found that Deltorto was engaged in a local carpentry business in Connecticut, the same state in which the house in question was being erected, and that he bought his lumber from a Connecticut dealer from local stocks which the lumber dealer had sometime prior to Deltorto's purchase imported from other states (82 NLRB, at 1034).

In No. 387, the Board found that the alleged secondary employer, Klassen, the erector-dealer of the "prefabricated" house, was engaged in a purely local construction business in the same state in which the "prefabricated" house was manufactured and had no "inflow" of materials across state lines (81 NLRB, at 802, 832).

In No. 393, there was no finding that the alleged secondary employers, Doose & Lintner, the general contractor, or any of the subcontractors whose employees were induced or encouraged to quit work allegedly in violation of Section 8 (b) (4) (A), had any "inflow," either direct or indirect, of materials across state lines (82 NLRB, at 1196, 1202-1204, 1208-1210).

In all four cases the Board assumed that the primary employer purchased varying quantities of materials originating in other states:

In No. 85, the Board found that the primary employer, Watson, was installing imitation tile obtained by it from a stock in the state, which had, however, at some previous time been imported from out of the state (80 NLRB, at 534, 542-543).

In No. 108, the primary employer, Langer, the electrical subcontractor, brought the electrical materials he was installing into Connecticut from his place of business in New York (82 NLRB, at 1035-1036).

In No. 387, the primary employer, Wadsworth, the manufacturer of prefabricated houses, obtained about one-half of his materials used either in constructing his plant or producing houses from out-of-state sources (81 NLRB, at 832).

In No. 393, the primary employer, Gould & Preisner, the electrical subcontractor, obtained the electrical supplies they used on the project in question from a stock which they maintained in the state, of which 65 per cent had at some previous time been imported from out of the state. There was no evidence that any of the supplies they were using on the project in question had in fact ever crossed state lines (82 NLRB, at 1202-1204).

The Board in each case based its finding that the unfair labor practice affected commerce upon two theories: (a) since the activities of the primary employer affected commerce, inducing the employees of a purely local employer to cease work in order to influence the conduct of the primary employer also affected commerce (No. 85, 80 NLRB, at 534-535; No. 108, 82 NLRB, at 1029; No. 387, 81 NLRB, at 803; No. 393, 82 NLRB, at 1196); and (b) although the business of one small building contractor does not itself affect commerce, he is representative of many others throughout the country whose aggregate businesses substantially affect interstate commerce in a way which can not be regulated unless each small contractor is regulated (No. 85, 80 NLRB, at 535; No. 108, 82 NLRB, at 1029, 1037-1038; No. 387, 81 NLRB, at 804; No. 393, 82 NLRB, at 1196). The courts of appeals in these cases upheld both of the Board's theories (No. 85, 181 F. 2d, at 129-131;

No. 108, 181 F. 2d, at 36-37; No. 387, 184 F. 2d, at 62; No. 393, R. 267).

Each of the Board's theories of jurisdiction is, we believe, demonstrably erroneous.

A. An Unfair Labor Practice Under Section 8 (b) (4) (A) of the Act cannot affect commerce if the secondary employer has no "inflow" or "outflow" of goods across state lines.

The Board's first theory of jurisdiction in these cases, that the effect on commerce may be measured by the primary employer's relationship to interstate commerce, ignores the statutory basis of jurisdiction. The Act does not confer jurisdiction on the Board wherever any of the parties have some relationship to interstate commerce. Nor does it confer jurisdiction on the Board wherever there is a labor dispute which has economic repercussions on interstate commerce. Rather, the Board is limited to the exercise of jurisdiction where the unfair labor practice found itself has led or tends to lead to a stoppage of the flow of goods in interstate commerce. Sections 2 (6) and (7) and 10 (a) of the Act.

Where, as the Board either found or assumed in each of these cases, the union's conduct in picketing or striking against the primary employer was a fair labor practice (No. 85, 80 NLRB, at 539, 546-547; No. 108, 82 NLRB, at 1028, n. 2, 1039-1040; No. 387, 81 NLRB, at 843; No. 393, 82 NLRB, at 1205, 1218), the stoppage of the flow of goods to and from the primary employer's business is a fair labor practice. Whatever the effect on commerce may be of the union's interference with the flow of goods to and from the primary employer, it is caused by a fair, rather than an unfair, labor practice. In other words, it is caused by a stoppage which Congress deliberately protected because in the long run the effects of such a stoppage were deemed more beneficial than detrimental. Con-

gress proceeded on the assumption that where the stoppage of the flow of commerce of the primary employer was caused by efforts of the union to organize or to achieve higher wages, as was true in the instant cases, the stability of relationship and the increased purchasing power which would ensue should the union achieve its objectives would so protect and increase the flow of commerce as to offset the ill effects of any momentary interruptions. Such interruptions of interstate commerce are to be contrasted with interruptions caused or threatened because of employer interference with union activities or refusals to bargain collectively. Interruptions in the flow of goods across state lines caused by employer unfair labor practices hold no promise of future stability or increased purchasing power but just the reverse.[1]

The legislative history of Sections 8 (b) (4) (A) shows that Congress intended thereby to protect the flow of goods in interstate commerce, to and from "innocent" or "unconcerned" third parties from stoppages due to unions inducing their employees to engage in sympathy strikes and secondary boycotts (H. Rep. 245 on H. R. 3020, 80th Cong., 1st Sess., pp. 4-5, 23; 93 Cong. Rec. 3834, 4198). Congress did not want a whole chain of interstate businesses to be stopped as the result of a dispute in which they were not involved, but instead wanted to limit the effect of strikes to a stoppage of the inflow and outflow of the business enterprise concerned in the dispute (93 Cong. Rec. 4198, 4835-4838, A-1222).

From the foregoing it follows that in cases such as these where the union's efforts to stop the flow of goods to and from the primary employer is a fair labor practice, the effect on commerce of violations of Section 8 (b) (4)

[1] Cf. *Automobile Workers* v. *O'Brien*, 339 U. S. 454, 456-457, with *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 42.

(A) must be judged solely by the inflow or outflow of goods in interstate commerce to and from the employer whose employees are wrongfully induced or encouraged to cease work. If, as is true in the instant case, the alleged secondary employer is neither engaged in importing or exporting goods across state lines in connection with the project on which his employees are induced to quit, the unfair labor practice of inducing his employees to quit neither causes nor tends to cause a stoppage of the flow of goods in interstate commerce. The Board, therefore, lacked jurisdiction of these cases.

B. Since the light construction industry neither sells its product nor buys its materials in an interstate market, small local strikes in that industry, in the absence of special circumstances, do not affect commerce within the meaning of Section 2 (6) and (7) of the Act.

The Board's second theory of jurisdiction in these cases assumes that the light construction industry, like all other industries whose interstate characteristics have been examined by the courts in determining the applicability of the National Labor Relations Act, operates in an interstate market. The fact is, however, as has been shown by repeated congressional investigations, reports of various governmental agencies and studies by economists, that the light construction industry is unique in its local characteristics. Every interstate aspect heretofore relied upon by this Court in upholding federal jurisdiction is lacking in the industry of constructing private homes and small commercial buildings.

Unlike agriculture (*Wickard* v. *Filburn*, 317 U. S. 111; *Mandeville Island Farms* v. *American Crystal Sugar Company*, 334 U. S. 219) and mining, its product is not sold in interstate commerce. The product both in its unfinished

and in its finished state constitutes real estate.[2] The finished building has fixity of site, connections with sidewalks, streets, sewer, water pipe, bulk and weight, which makes its market purely local.[3] This Court pointed out in *Browning* v. *Waycross*, 233 U. S. 16, 22, that a completed house by its very nature "could not have been the subject of interstate commerce." In dismissing an indictment for fixing the price of electrical systems on the ground that it did not show any restraint of interstate commerce, the court in *United States* v. *San Francisco Electrical Contractors Ass'n*, 57 F. Supp. 57, 65-66, n. 3 (N. D. Calif., S. D.), said:

> Here there is the construction of a system, which in its very making became a part of a building to which it was attached. By the law of fixtures, it became a part of the land on which the building stood. Certainly the "system" could not be the object of interstate commerce, for it was never in it. It came into being locally in the state, and never had a detached existence, rendering it capable of *being traded in interstate commerce.* (Emphasis in original.)

This Court has recently had occasion to note that the business of selling real estate was purely local and did not involve interstate commerce. *United States* v. *Real Estate Boards*, 339 U. S. 485, 488.

Unlike the manufacturing enterprises (*National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601) and large department stores (*National Labor Relations Board* v. *May Department Stores*, 146 F. 2d 66 (C. A. 8), modified

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[2] This fact is recognized by both lawyers and economists: "The general principle of law is * * * that prima facie a house is real estate." American Jurisprudence, *Property*, §18, p. 199; "Houses represent a subcategory of real estate and their production is influenced by this fact." Grebler, Leo, *Production of New Housing: A Research Monograph on Efficiency* (N. Y. Social Science Research Council, 1950), p. 3.

[3] Grebler, *op. cit.*, pp. 9-10, 15-16, 36, 54; Twentieth Century Fund, *American Housing* (1944), pp. 38-39, 44.

in part, 326 U. S. 376) over which the Board's jurisdiction has been sustained because of the inflow of goods from across state lines, the light construction industry does not import its raw materials from out-of-the-state. The contractor who builds, remodels and repairs houses and small commercial buildings purchases the materials he uses on a day-to-day basis from local hardware and retail lumber dealers, of whom there are some seventy-three thousand scattered among the forty-eight states.[4] The items purchased "are materials which must go through further manufacture before they are usable in the form of a completed house. In no other comparable industry do we distribute the material necessary for production through retail channels."[5]

The retail distribution of the raw materials used in the light construction industry reflects in large measure the intrastate source of most of the materials used. The astonishingly great use of local materials in the light construction industry is due to the following factors: almost every state has sufficient raw materials to meet its own light construction industry demands. Most of the materials are bulky and expensive to ship. Due to building codes, local traditions, and climate variations, each locality has its own peculiar set of materials which cannot be used in most other communities. Lumber accounts for practically one-half of the cost of materials used in light construction. Every state has timber stands. Small sawmills being more economical than large ones, cutting and planing are done locally.[6] Every state has clay deposits and manufactures

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[4]Stone, Peter A., *Toward More Housing*, 76th Cong., 3rd Sess., TNEC Monograph No. 8 (Gov't. Print. Off., 1940), pp. 35, 38, 59, 66, 128, 184; Hayes, Warren B., *A Study of the Distribution of Building Materials* (Harvard School of Business Administration, 1950), pp. 8, 34.

[5]Stone, *op. cit.*, p. 184.

[6]Hayes, *op. cit.*, pp. 25-26; Stone, *op. cit.*, p. 64.

its own brick and clay products.[7] Every state has its own sand, gravel and stone, the ingredients of cement.[8] More than a thousand companies scattered through forty states produce paint and varnish.[9]

"Building codes control the type of materials used * * *. Many of the features of local building codes having to do with materials * * * have been influenced by one after another particular building material * * * interest."[10] "Legislative bodies, both state and local, assist in many of these restraints * * * by prohibiting use of out-of-state materials."[11] This localism has produced a complete lack of standardization which in turn perpetuates the localism of the industry.[12] "More than 1,000 varieties of lavatory and sink traps and 19,000 kinds of valves and fittings complicate plumbing. There are 150 strengths of window glass."[13] There are 1,200 sizes of slate roofing.[14] Many building materials do not compete with out-of-state products and their prices vary from town to town solely on the basis of the local situation.[15] No figures are available as to the quantity of raw material which is used by the light construction industry.[16]

The light construction industry is composed of a continually fluctuating and indeterminant number of small contractors.[17] The "same contractor moves from houses

[7]Keim, Walter G., *Geographical Differentials in Prices of Building Materials*, 76th Cong., 3rd Sess., TNEC Monograph No. 33 (Gov't. Print. Off., 1940), p. 379; Stone, *op. cit.*, p. 63.

[8]Keim, *op. cit.*, p. 409.

[9]Keim, *op. cit.*, p. 123.

[10]Stone, *op. cit.*, p. 39; Colean, Miles L., *Your Building Code* (National Committee on Housing, Inc., 1946), p. 16.

[11]Stone, *op. cit.*, p. 140.

[12]Hayes, *op. cit.*, p. 45.

[13]H. Doc. No. 647, 80th Cong., 2d Sess., *High Cost of Housing* (Gov't. Print. Off., 1948), pp. 139-140. See also Grebler, *op. cit.*, p. 39; Stone, *op. cit.*, p. 61.

[14]Stone, *op. cit.*, p. 138.

[15]Stone, *op. cit.*, pp. 60-64.

[16]Twentieth Century Fund, *op. cit.*, pp. 398-399.

[17]Grebler, *op. cit.*, pp. 6-7, 35-36, 90; Hayes, *op. cit.*, p. 30.

to farm buildings to small stores to remodelling and repairing.'"[18] "Houses are built almost entirely by local enterprises which operate only in their own city or its suburbs."[19] Builders are limited to their own community by the difficulty of familiarizing themselves not only with local market prospects but also local regulations and their interpretation by administrative officials. "Variations in these regulations mean that the builder cannot easily transfer his pattern of land development, design and layout, or use of materials and operational methods, from one place to another."[20] Very few builders are even members of any national association.[21]

The labor used in the light construction industry is usually recruited from the neighborhood.[22] No direct count of the number employed is possible, the Bureau of Labor Statistics making its estimates on the basis of the most indirect evidence.[23] Wage rates vary in erratic fashion from city to city.[24] Labor practices and methods show similar wide diversity.[25] Collective bargaining contracts pertain only to a given locality.[26] Strikes are usually limited to one project, and never extend beyond the city and immediate vicinity.[27]

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[18] Hayes, *op. cit.*, p. 7.
[19] Stone, *op. cit.*, pp. 128, 182-183; Millis, Harry A., *Organized Labor* (1945), Vol. 3, pp. 376-377.
[20] Grebler, *op. cit.*, p. 16; Twentieth Century Fund, *op. cit.*, p. 39.
[21] Stone, *op. cit.*, p. 129.
[22] Stone, *op. cit.*, p. 128.
[23] Grebler, *op. cit.*, p. 90.
[24] Stone, *op. cit.*, p. 57; U. S. Bureau of Labor Statistics, Bull. No. 940, *Occupational Outlook Handbook* (Gov't. Print. Off., 1948), p. 177; Bureau of Labor Statistics, Bull. No. 626, Peterson, Florence, *Union Scales in Wages and Hours in the Building Trades* (Gov't. Print. Off., 1937), pp. 26-46; Bull. No. 730, same title (Gov't. Print. Off., 1942), pp. 28-66; Bull. No. 815, same title (Gov't. Print. Off., 1944), pp. 25-60.
[25] U. S. Bureau of Labor Statistics, Bull. No. 680, *Union Wages, Hours and Working Conditions in the Building Trades*, June 1, 1941 (Gov't. Print. Off., 1942), pp. 33-34.
[26] Grebler, *op. cit.*, p. 16; Bureau of Labor Statistics, Bull. No. 680, *op. cit.*, pp. 33-34.
[27] Haber, William, *Industrial Relations in the Building Industry* (1930), p. 329; U. S. Bureau of Labor Statistics, Bull. No. 694, Handbook of Labor Statistics, 1941 ed., Vol. I, pp. 329-342.

The Board assumed jurisdiction in the instant cases without making any study of the interstate characteristics of the light construction industry. As the Board in later cases began to get better acquainted with the facts of the industry, it has abandoned its theory that the industry as a whole is an interstate one which requires regulation of its small component parts, and now declines to assert jurisdiction where the labor dispute does not itself threaten interruption of a substantial inflow of materials across state lines. Cf. *Merrill Construction Co., Inc.*, 92 NLRB, No. 26; *Glazers Union*, 90 NLRB, No. 93; *Denver Building Trades Council*, 90 NLRB, No. 66; *B. W. Fellers Co.*, 88 NLRB, No. 212; *Row Construction Co.*, 88 NLRB, No. 132; *Petredis & Fryer*, 85 NLRB 241; *Walter J. Mentzer*, 82 NLRB 389. The facts respecting commerce recited in the foregoing cases fully confirm the material we have gathered here and show that the light construction industry rarely involves the inflow of any substantial materials from out of the state.

At the time of the enactment of the Labor Management Relations Act, Senator Taft stated that its provisions respecting jurisdictional strikes would not be generally applicable to the construction industry: "The construction industry ordinarily would be intrastate commerce and would not be affected by the Act." 93 Cong. Rec. A 3370.

This Court has, of course, always held that the erection of private homes was purely intrastate commerce. *Browning v. City of Waycross*, 233 U. S. 16, 22-23. See also cases cited in No. 85, Brief of Petitioners, pp. 51-54.

It is therefore respectfully submitted that the Board improperly assumed that labor disputes in the light construction industry would necessarily cause the stoppage of the flow of goods in interstate commerce. Indeed, the

facts which may be judicially noticed show that labor disputes in the light construction industry do not cause substantial interruption to the flow of goods in interstate commerce.

II.

Section 8 (b) (4) (A) of the Act does not make it an unfair labor practice for a union to induce or encourage employees to cease working on, or making deliveries to, a building project where nonunion labor is being employed by one subcontractor.

The Board, and all the courts which have construed Section 8 (b) (4) (A) of the Act, except the Court of Appeals for the Fifth Circuit,[28] have held that Section 8 (b) (4) (A) is not to be applied literally. Among the various reasons for departing from a literal reading have been the fact that such a reading would virtually repeal Section 13 of the Act and the fact that the legislative history of Section 8 (b) (4) (A) shows it was intended to have a much narrower effect than the breadth of its language might at first suggest. See the opinion of Judge Fahy in the court below in No. 393, R. 272-279, and cases there cited. We will not here argue the point that Section 8 (b) (4) (A) is not to be taken literally except to call attention to the fact that all the material here presented to support our interpretation of this section necessarily reinforces that point.

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[28] *International Rice Milling Co.* v. *National Labor Relations Board*, 183 F. 2d 21, 26-27 (C. A. 5), certiorari granted, 340 U. S. 902.

A. Section 8 (b) (4) (A) makes an unfair labor practice only such strikes and picketing as are secondary boycotts at common law.

The committee reports and the debate in Congress on the Taft-Hartley bill make it clear that Congress intended by Section 8 (b) (4) (A) to make it an unfair labor practice for unions to engage in such secondary boycotts as are illegal at common law.

During the hearings the sponsors of the bill engaged in several discussions as to what was to be regarded at common law as primary activity and what secondary. While, so far as we have been able to discover, they did not discuss the precise situation presented by the introduction of nonunion men onto a construction project, their understanding of the terms primary and secondary was clearly that of the common law cases, which as we shall show hereinafter, regarded the instant type of activity as falling within the class of permissible primary rather than prohibited secondary. Senator Taft and Senator Donnell, without dissent from other members of the Senate Committee, repeatedly stated that the following two situations were to be regarded as primary rather than secondary: (1) picketing a grocery store to tell people not to buy or handle soap manufactured by an unfair manufacturer; (2) picketing or striking a print shop because another employer whose own printers are on strike has his type set there. At the Hearings on Bills to Amend the National Labor Relations Act, Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess., p. 63, Senator Taft as Chairman of the Committee, stated:

> As long as you take the position you should not buy soap from an A & P grocer, that is one thing; but when you say you shall do no business with the A & P grocer because they are selling soap, that seems to me to be a secondary boycott . . .

Senator Donnell: I think it would be very easy for pickeeters to carry signs which show the basis of the picketing.

At hearings, p. 1838-1839, Taft again said:

The Chairman: You cite one type of secondary boycott and you say, "Would it be fair to a strike of printers to permit their employer to have the type set elsewhere in a nonunion shop, and the type or matrix of the type then delivered to the employer, thus nullifying the strike?" * * * Where is the secondary boycott in it? That is what I want to know.

Mr. Batezel: Some union leaders consider that as a secondary boycott,

Mr. Chairman: I would not think it was * * *

* * * * * *

Mr. Chairman: Of course, in your second instance of 10 plants of the same corporation, there is no secondary boycott involved in that at all.

Mr. Batezel: Well, to my mind, that is what probably was meant by the secondary boycott in the bill.

Mr. Chairman: No. However, go ahead. I have not been able to find more than some very mild things which could easily be exempted that are in this so-called class of legitimate secondary boycotts. I keep hearing about them, but I have not found any examples where they seem to me particularly legitimate and still seem to fall within the classification of secondary boycotts injuring the third person's legitimate business.

Again at hearings, page 254:

Teller: * * * Labor unions should have a right to engage in concerted activity against those who aid employers involved in labor disputes, but third parties innocent of participation in the primary dispute should be protected from such concerted activity.

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> The Chairman: You make a distinction as to whether the person being boycotted is in some way assisting * * *
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> * * * * * *
>
> The Chairman: * * * I can see why if you have one newspaper and the second newspaper undertakes to publish the paper for the first one.

See also hearings, Senate, pp. 255-256, 568.

During the debates in Congress Senator Taft stated that the sponsors of Section 8 (b) (4) (A) had no intent to ban strikes or picketing which had any direct relationship to the work of the striking employees. Senator Taft said (93 Cong. Rec. 3838):

> It is made an unfair labor practice for any union to engage in a secondary boycott * * * I think the committee all agreed that those types of strikes are in effect racketeering strikes. They are strikes which are not direct strikes to settle wages or hours or better working conditions. They are strikes which are, in effect, attempts to bring indirect pressure on third parties in some way to bring about a result which may ultimately be favorable to the one initiating the pressure, which has no direct relation to the work except perhaps with regard to the question of power.

During the debates Senator Taft further explained that it was the intent of the draftsmen of Section 8 (b) (4) (A) thereby to do no more than restore on the federal level the prevailing common law illegality of secondary boycotts (93 Cong. Rec. 3834, 4198). After reverting to the state of the federal law on secondary boycotts because of the Clayton and Norris-LaGuardia Acts, Senator Taft said (93 Cong. Rec. 4198):

> All this provision of the bill does is reverse the effect of the law as to secondary boycotts.

Senator Taft then went on to advert to the fact that his father wrote many decisions holding the secondary boycott illegal at common law (93 Cong. Rec. 4198).

The foregoing legislative history was summed up by Judge Rifkind in *Douds* v. *Metropolitan Federation of Architects*, 75 F. Supp. 672, 677 (D. C. S. D. N. Y.):

> Examination of these expositions of Congressional purpose indicates that the provision was understood to outlaw what was theretofore known as a secondary boycott. It is to the history of the secondary boycott, therefore, that attention should be directed, and it is in the light of that history that the term "doing business" should be evaluated.

To the same effect see *Mills* v. *United Association of Journeymen and Apprentices*, 83 F. Supp. 240, 244 (D. C. W. D. Mo.).

B. Striking or picketing a construction project because of the presence of nonunion employees working for one subcontractor is not a secondary boycott at common law.

It is well established that the conduct of a union in striking or picketing a building project where nonunion employees are working for one contractor does not constitute a secondary boycott at common law. *Gray* v. *Building Trades Council*, 91 Minn. 171, 97 N. W. 663, 1118, 63 LRA 753, 103 Ann. St. Rep. 477, 1 Ann. Cas. 172; *Meier* v. *Speer*, 96 Ark. 618, 132 S. W. 988, 32 LRA n. s. 792; *Cohn & Rath Electric Co.* v. *Bricklayers', Masons' & Plasterers' Local Union No. 1*, 92 Conn. 161, 101 Atl. 659, 6 ALR 887; *Kingston Trap Rock Co.* v. *International Union of Operating Engineers*, 129 N. J. Eq. 570, 19 A. 2d 661; American Jurisprudence, Vol. 31, *Labor* §§ 264-265.

While the American Law Institute in its Restatement of the Law of Torts does not use the terms "primary,"

"secondary" and "boycott" (Vol. 4, pp. 93, 101-102, 138-139), its exposition of the law on this subject shows that such activity was not regarded as a secondary boycott at common law. The following Sections of the Restatement are applicable:

> § 780. Representatives of Workers or Employees.
>
> A labor union or any person acting at the invitation of workers and on their behalf may exercise for them their privileges of concerted action.
>
> * * * * * *
>
> § 799. Inducement of Third Persons by Fair Persuasion.
>
> Employees are not liable to their employer for harm caused by inducing third persons through fair persuasion and for a proper object to refrain, during their dispute with the employer, from
>
> * * * * * *
>
> (d) being engaged on a job on which he also is engaged.
>
> * * * * * *
>
> *Comment on Clause* (d):
>
> e. *Working on the same job with employer.* Clause (d) finds its typical illustration in the building industry. Other industries have achieved a considerable degree of integration. Stages in the manufacture of a finished product which were formerly separately controlled are now under unified control; therefore, employees engaged in what were previously separate businesses are now employees of one employer in one business. But the building industry continues to use an elaborate system of subcontracting. Yet, the workers engaged on a particular building have considerable interest in common and their employers similarly have a community of interest. Whether they are bricklayers, carpenters, hod carriers or electricians, the workers commonly work side by side and, so far

as employers oppose them, they are frequently associated together or, at any rate, are united in their interests. Clause (d) is not restricted, however, to the building trades.

* * * * * *

§ 805. Refusal to Work on Job in Aid of Dispute With Another Employer on Same Job.

Employees who in concert refuse to work on a job on which is engaged also a third person whose employees are not members of a labor union satisfactory to the actors or are engaged in a labor dispute with him for a proper object are not liable to their employer or to the third person for harm caused thereby.

Comment:

a. The rule stated in this Section rests on the general principle underlying the rules stated in §§ 802 and 803 and the reasons discussed in § 799, Comment e. Typical illustrations included in this Section are found in the building industry.

Illustrations:

1. A operates a department store and employs clerks therein. He licenses B to operate the men's clothing department. The salesmen employed by B are not union members and are on strike for higher wages. Because of this A's clerks strike. They are not liable to either A or B.

2. A, an employer of carpenters, and B, an employer of plasterers, are engaged in work on the same building. The plasterers are on strike for higher wages. Because of this, the carpenters refuse to work on the building. They are not liable to either A or B.

A reading of the cases reveals a recognition by the courts that the peculiarities of the building trades has

divided among numerous employers what in most industries would be done by one employer. The courts have accordingly understood that if labor in the building industry is to have the protection for concerted activity deemed essential for other labor, the fortuities of legal employment relationships must be ignored. This aspect of the building trades was adverted to in the comment quoted above from the Restatement of the Law of Torts, § 799. It is emphasized in studies of the building trades. See Haber, William, *Industrial Relations in the Building Industry* (Harvard, 1930), p. 329:

> The manner in which the work in the building industry is parcelled out among the contractors makes cooperation among the several crafts indispensible. A subcontractor may have only a few days' work; and if he violates an agreement or a union rule, before the union can hold a meeting and call a strike his work may be finished and his men discharged. Even if quick action is possible, the union program may be defeated by another circumstance. The work of each subcontractor is only a small portion of that to be done on the entire building. A strike by one union may not delay the work of the other trades sufficiently to be effective. Pressure must be brought to bear upon the general contractor who is responsible for the entire building. Such pressure can be brought about, not by strikes of single trades, but by tying up the entire job.

Of the federal judges before whom this question has been presented under the Taft-Hartley Act, five have held that Section 8 (b) (4) (A) was not intended by Congress to outlaw strikes or picketing of a building project because of the use of non-union labor thereon. These judges are Judges Fahy, Edgerton and Bennett Champ Clark in Court of Appeals for the District of Columbia in No. 393, Judge Charles E. Clark in the

Court of Appeals for the Second Circuit in No. 108, and Judge Duncan in *Mills* v. *United Ass'n of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry*, 83 F. Supp. 240, 245 (W. D. Mo.).

It is, of course, undisputed that in each of the three cases now before this Court the strike and picketing was caused by the presence of nonunion employees on the same job with union employees, No. 85, 80 NLRB, at 536, n. 11; No. 108, 82 NLRB, at 1029, n. 6; No. 393, 82 NLRB, at 1196-1197, 1209-1211.

To construe Section 8 (b) (4) (A) as rendering illegal the stikes and picketing in these cases would turn the law back a full half century. We do not believe that Congress either intended to or did make it unlawful for a union to induce or encourage employees to strike or engage in a concerted refusal to work with the nonunion employees, in order to protect its members from the destructive influences of nonunion men working on the same job with them.

III.

Section 8 (c) precludes the board from finding as an unfair labor practice under Section 8 (b) (4) (A), picketing which the Board finds is merely an expression of views, argument and opinion without threat.

One of the questions before this Court in No. 108 is whether the Board properly held that the picketing there involved, although the evidence showed that it constituted merely an expression of views, argument and opinion which contained no threat, nevertheless, was an unfair labor practice under Section 8 (b) (4) (A). The Trial Examiner, after carefully analyzing the evidence found as a fact that the picketing was simply and nothing more than an expression of views, argument or opinion within

the meaning of Section 8 (c) of the Act (82 NLRB, at 1050) and further found that that expression contained no threat of reprisal or promise of benefit within the meaning of Section 8 (c) of the Act (82 NLRB, at 1053). Accordingly, the Trial Examiner recommended a dismissal of the complaint (82 NLRB, at 1053-1054). The Board affirmed and adopted as its own the Trial Examiner's findings of fact in this regard (82 NLRB, at 1028-1029) but held that picketing constituted an unfair labor practice within the meaning of Section 8 (b) (4) (A), because Section 8 (c) was not to be regarded as applicable to Section 8 (b) (4) (A) of the Act (82 NLRB, at 1029). In this respect the Board, without any discussion of this point, cited and stated (82 NLRB, at 1029) that it was following its decision in *Wadsworth Building Co.*, 81 NLRB 802, the case in which the *amici curiae* were the respondents before the Board and which is pending here on petition for writ of certiorari, No. 387, this Term.

A. Section 8 (c) is applicable to section 8 (b) (4) (A).

In its decision in the *Wadsworth* case the Board expressly conceded that a literal reading of Section 8 (c) would require that it be held to limit and qualify Section 8 (b) (4) of the Act (81 NLRB, at 811). For Section 8 (c) provides that the expression of views, argument or opinion which contains no threat or promise "shall not constitute or be evidence of an unfair labor practice under *any of the provisions of this Act*" (emphasis supplied). Concededly, Section 8 (b) (4) is one "of the provisions of this Act." The Board, however, excepted Section 8 (b) (4) from the provisions of the Act which were qualified by Section 8 (c) on the ground that to qualify the words "induce" and "encourage" in Section 8 (b) (4) by the limitations of Section 8 (c) would change them into

"coerce or constrain" (81 NLRB, at 812). But this does not justify rewriting Section 8 (c). Limiting Section 8 (b) (4) does not lead to any ambiguity or absurdity. Reading a qualifying section of a statute into the other sections usually does change their meaning. This is the purpose of the qualifying section. Indeed, reading Section 8 (c) into Section 8 (a) (1) completely reads out the words "interfere" since "restrain" and "coerce" are already there and with the qualifications of Section 8 (c) the word "interfere" adds absolutely nothing. Reading Section 8 (c) into Section 8 (a) (2) changes the word "interfere" there used into "restrain or coerce."

The legislative history of Section 8 (c) likewise requires it to be held applicable to Section 8 (b) (4). There is not a single statement by the proponents of the Act during the period of its enactment that Section 8 (b) (4) was not covered by Section 8 (c). The sponsors of Section 8 (c) vigorously defended its fairness on the ground that it would apply to unfair labor practices of unions as well as unfair labor practices of employers. Senator Taft in a colloquy with Senator Ives during the course of which Senator Taft insisted that all the provisions respecting unions were paralelled by provisions respecting employers, stated (93 Cong. Rec. 4020):

> I may point out that the provision regarding free speech applies both to employer and employee.

To the same effect see H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 45; H. Rep. No. 245, 80th Cong., 1st Sess., pp. 6, 33; S. Rep. No. 105, 80th Cong., 1st Sess., p. 23; 93 Cong. Rec. 4893, 6443, 6859.

Section 8 (b) (4) includes the major types of union unfair labor practice condemned by the Act. If Section 8 (c) does not protect employees in respect to this type of

unfair labor practice there is almost no place where Section 8 (c) would afford employees any protection.

On July 8, 1947, in a series of written questions and answers (93 Cong. Rec. A 3370) Senator Taft in response to the question whether an appeal by a union urging all working people, members of its own union, members of other unions, and members of the public generally, to refuse to buy goods from a particular employer, would violate the Act, stated, "This is not forbidden by the Act, since it is merely persuasion." In view of the fact that Section 8 (b) (4) (A) is the only boycott section of the Act, this statement by the sponsor of the Act shows that he intended Section 8 (c) to qualify Section 8 (b) (4) (A).

Since deciding the instant cases the Board has changed its mind with respect to the applicability of Section 8 (c) to Section 8 (b) (4). In *Denver Building and Construction Trades Council and Henry Shore*, 90 NLRB, No. 224, decided August 7, 1950, the Board stated that it was now satisfied that its position in the *Wadsworth* case "was not correct." In the case in which *amici curiae* are petitioners here, No. 387, the Board, in its brief in opposition to certiorari, cited its *Denver* case and conceded the applicability of Section 8 (c) to Section 8 (b) (4) (A) of the Act (Br. in Opp., No. 387, pp. 15-16). The Board, however, there took the position that its order should be sustained because Section 8 (c) afforded no protection for free speech beyond that provided by the First Amendment (Br. in Opp., No. 387, pp. 15-17, and the quotation p. 17, n.). It is the position of *amici curiae* as set forth in their reply brief in No. 387 (pp. 1-7), that: (1) the Board's findings that the picketing in question is within Section 8 (c) precludes a re-evaluation of whether the picketing in question is so protected; (2) Section 8 (c) affords a broader protection for free speech than does the First Amendment; and (3) the picketing in question is

protected by the First Amendment. Since the position of *amici curiae* in their case, No. 387, is fully applicable to No. 108, we wish to here set it forth so that whatever the position urged by the Board in No. 108, this Court will not pass on legal issues also applicable to No. 387, without having *amici curiae's* arguments before it.

B. The Board's determination that the picketing in question was merely the expression of views, argument or opinion without threat was a finding of fact which it cannot attack.

Once it is held that Section 8 (c) applies, the judgment below in No. 108 must be reversed for the Board found as a fact that all of the conduct on which its order was based constituted merely the expression of views, argument or opinion without threats (82 NLRB, 1028, 1029, 1048-1050, 1053). The two main issues litigated at the hearing in No. 108 were (1) whether the picketing constituted a command, signal, or order, as contended by the General Counsel, or merely the expression of views, argument, or opinion, as contended by the union (82 NLRB, at 1047-1050; and (2) whether or not the picketing contained an implied threat of union reprisal or an implied promise of union benefit, as contended by the General Counsel and denied by the union (82 NLRB, at 1050-1053). The Trial Examiner found that the evidence did not sustain the General Counsel's contention in either respect (82 NLRB, at 1048-1050, 1053). The Board affirmed (82 NLRB, at 1028-1029).

The Board cannot attack its own findings of fact. Nor can this Court sustain the Board's order on any theory other than that upon which the Board based its order. *Securities and Exchange Commission* v. *Chenery Corp.*, 316 U. S. 80, 87-95; *Eastern-Central Motor Carriers Assn.* v. *United States*, 321 U. S. 194; *City of Yonkers* v. *United*

States, 320 U. S. 685, 691-692; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488-489.

C. Section 8 (c) affords a broader protection for free speech than that provided by the first amendment to the Constitution of the United States.

We believe that the factual character of the Board's determination that all of the union's conduct in No. 108, was protected by Section 8 (c) will make it unnecessary for this Court to consider the scope of Section 8 (c). However, the Board in No. 387, has suggested such an approach, arguing that Section 8 (c) is identical in scope with the First Amendment (Br. in Opp., pp. 15-17). In the case of *Denver Building and Construction Trades Council and Henry Shore*, 90 NLRB, No. 224, the Board stated "there is nothing in the Act or in its legislative history to indicate that Congress intended to go beyond the protective scope of the Constitution." We believe that both the Act itself and its legislative history do indicate Congress intended to grant broader protection for free speech than the First Amendment. If this Court should consider the scope of Section 8 (c), we urge it to hold that this statutory protection for free speech goes further than the Constitution in several respects here relevant.

Section 8 (c) provides that the expression of views, argument, or opinion unaccompanied by threats or promises "shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act." If Congress intended this section to be read literally it is apparent that this section confers numerous immunities not granted by the First Amendment as interpreted by this Court. The use of noncoercive communication as evidence in both civil and criminal cases has never been

held barred by the First Amendment. Cf. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 479. But limitations of noncoercive communications as to geographic locale, economic locale and justifiable objective have been deemed consistent with the First Amendment. The drafters of Section 8 (c) ignored the contours of the First Amendment as spelled out in *Carpenters Union* v. *Ritter*, 315 U. S. 722, and *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490. They wrote no such qualifications or restrictions into Section 8 (c).

The legislative history of Section 8 (c) forecloses any possible contention that Section 8 (c) was intended to afford no greater protection to communication than the First Amendment. Dissatisfaction with the scope of protection given communication under court, as well as Board, interpretation of the First Amendment was the expressed reason for the insertion of Section 8 (c) in the Act.

The Board had originally held that any anti-union statements by an employer to his employees were necessarily coercive because of the power which the employer held over his employees' jobs. This position of the Board was sustained by the courts in *National Labor Relations Board* v. *Federbush Co.*, 121 F. 2d 954 (C. A. 2). There Judge Learned Hand said (at p. 957):

> The privilege of "free speech," like other privileges, is not absolute * * * Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and *pro tanto* the privilege of "free speech" protects them; but, so far as they disclose his wishes, as they generally do, they have a force independent of persuasion.

> The Board is vested with the power to measure these two factors against each other, a power which does not trench upon the First Amendment. * * * What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart.

During the hearings of the Special Committee to Investigate the National Labor Relations Board appointed by the Seventy-Sixth Congress, witness after witness condemned this Board policy. The Intermediate Report issued by this Committee,[29] as well as its Final Report,[30] vigorously criticized the Board's policy of holding employer anti-union statements, unaccompanied by threats, to constitute unfair labor practices. They recommended that Section 8 (1) of the Act be amended as follows to correct this practice:[31]

> But nothing in this section or this act shall be construed or interpreted to prohibit any expression of opinion with respect to any matter which may be of interest to employees, or the general public, provided that such expressions of opinion are not accompanied by acts of coercion, intimidation, discrimination or threats thereof.

At the opening of the hearings in the Eightieth Congress which led to the adoption of the Taft-Hartley Act, Congressman Howard W. Smith, who had been chairman of the Special Committee in the Seventy-Sixth Congress, summarized the evidence gathered by his Committee and its recommendations with respect to free speech.[32] Other

[29] H. Rep. No. 1902, 76th Cong., 3d Sess., pp. 83, 90-91.
[30] H. Rep. No. 3109, 76th Cong., 3d Sess., pp. 82-83, 90-91.
[31] H. Rep. No. 1902, 76th Cong., 3d Sess., pp. 91, 104-105; H. Rep. No. 3109, p. 159; H. R. 9195, 76th Cong., 3d Sess., Sec. 7.
[32] Hearings, House Committee on Education and Labor, 80th Cong., 1st Sess., on H. R. 8, p. 80.

witnesses before the committees of the Eightieth Congress pointed out that while the Board had to some extent receded from its original position of preventing any anti-union statements by employers, legislation was still needed both to further limit the Board and to be certain it never resumed its original position.[33] The reports issued by the House and Senate Committees expressed the view that an amendment of the Act was essential to prevent the Board and the courts from unduly limiting free speech.[34]

There was considerable diversity of opinion among the members of the Senate as to how congressional rectification of undue limitations on free speech should be achieved. Senator McClellan proposed an amendment providing that in the application of the Act administrators and courts should not infringe upon "freedom of speech as guaranteed by the First Amendment to the Constitution of the United States." That this amendment would be ineffective to accomplish the congressional purpose was made clear by Senator Ferguson, who stated (93 Cong. Rec., 4893):

> I was wondering how this amendment would change the law. The highest law of the land, namely, the Constitution, is being cited in this amendment. If the same court is to construe this law which has been construing the Constitution, how can any change be effective?

The formulation proposed by Senator McClellan was thus rejected and a formulation adopted which Congress intended the courts should apply without the limitations and mutations which have been read into the First

[33] Hearings, House Committee on Education and Labor, 80th Cong., 1st Sess., pp. 25-28, 2722-2723.

[34] S. Rep. No. 105, 80th Cong., 1st Sess., pp. 23-24; H. Rep. No. 245, 80th Cong., 1st Sess., pp. 6, 33.

Amendment.[25] Thus the whole purpose of Congress in writing Section 8 (c) would be defeated should the courts start narrowing it to coincide with the First Amendment.

In its decision in *Denver Building and Construction Trades Council and Henry Shore*, 90 NLRB, No. 224, the Board defined the scope of Section 8 (c) by reference to several decisions of this Court fixing the scope of the First Amendment as applied to picketing. These cases bring out clearly the differences between Section 8 (c) and the First Amendment. The first of these is *Giboney* v. *Empire Storage Co.*, 336 U. S. 490 (Br. in Opp., pp. 15-17). In that case this Court relied heavily upon the fact that under the union constitution any member crossing a picket line could be fined or suspended (at pp. 493, 498, 500, n. 6, 504). This Court, therefore, found that the picket line constituted a threat that any union member crossing the picket line would lose his union membership (at p. 498). This Court's opinion was based upon the theory stated in a concurring opinion in *Thomas* v. *Collins*, 323 U. S. 516, 537-538, which this Court quoted with approval in the *Giboney* case (at p. 503, n. 6): "But once [a speaker] uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee." As we have already demonstrated, Section 8 (c) was passed because of Con-

[25] Various statements found in the legislative history to the effect that Section 8 (c) merely preserved the constitutional right of free speech were made with respect to the Senate version, which was in this respect much less restrictive than the version of Section 8 (c) finally adopted. The Senate version permitted a finding of threat or promise when the communication was considered "under all the circumstances" (H. R. 3020, 80th Cong., 1st Sess., as passed Senate). This language was stricken because it was believed that the Board and the courts had in the past rendered hazardous speech, innocuous in itself, by creating an ever present danger that later events might give it meanings not present on its face (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 45; 93 Cong. Rec. 6443-6444, 6859).

gressional disapproval of the Board's reliance upon the employer's control over jobs as the basis for finding employer anti-union speeches illegal. Congress clearly intended that mere existence of power over jobs, whether in the union or the employer, without any threat to exercise that power, should not render speech unfair.

Because of Section 8 (c), one of the chief issues litigated in No. 108, was whether the picketing implied any threat of union discipline (82 NLRB, at 1050-1053). The Trial Examiner found that under the circumstances shown by the record it did not (82 NLRB, at 1053). The Board affirmed (82 NLRB, 1028-1029).[26] To the extent that *Giboney* rested on a theory of threat arising from picketing, Section 8 (c) makes it inapplicable here. To the extent that *Giboney* rested on a finding of threat, the contrary finding in No. 108 makes *Giboney* inapplicable. The same distinction applies to *Hughes* v. *Superior Court*, 339 U. S. 460; *International Brotherhood of Teamsters* v. *Hanke*, 339 U. S. 470; *Building Service Employees* v. *Gazzam*, 339 U. S. 532. These cases involved picketing which in addition to being communicative was also coercive. In the *Gazzam* case the decision of the Supreme Court of Washington had been based on the fact that the picketing therein had lost its protection since it had stepped "over the line from persuasion to coercion." 339 U. S., at 536, n. 2. In the *Hughes* case this Court upheld the right of a state to enjoin picketing "because of the compulsive features" there present which placed the picketing "beyond the aspect of mere communication as

[26] Even if the Board had found such a threat, we have serious doubts whether a threat of union discipline is the kind of a threat which is meant by Section 8 (c). Cf. the American Restatement of the Law of Torts, §798. The power of a union to discipline does not today involve any power over jobs since Sections 8 (a) (3) and 8 (b) (2) of the Act abolish the closed shop and protect employees from losing their jobs if denied membership in or expelled from membership in a union for any reason other than the failure to pay dues and initiation fees.

an appeal to reason." 339 U. S., at 468. And in the *Hanke* case, this Court, observing that "because of the interference by the pickets with the use of one of Cline's driveways, he was forced to close it" (339 U. S., at 473), concluded that the "ingredient of communication" present in picketing (at 474) did not save it from state restrictions "leaving all other channels of communication open to the union" (at 477). If the finding of coercion in these cases rested on a theory, Section 8 (c) precludes the use of such a theory here. If it rested on a finding of fact, the contrary finding in No. 108 makes the cases inapplicable. It is thus clear that irrespective of their constitutional status, the union's acts in No. 108 were protected by Section 8 (c).

D. The picketing in question was constitutionally protected.

We believe that the finding that the picketing in No. 108 was merely the expression of views, argument or opinion without threat, brings the case within the principles of *Bakery Drivers* v. *Wohl*, 315 U. S. 767; *Cafeteria Employees* v. *Angelos*, 320 U. S. 293; *American Federation* v. *Swing*, 312 U. S. 321; *Thornhill* v. *Alabama*, 310 U. S. 88. All of the subsequent cases holding picketing unprotected rested upon a determination that the picketing there present was coercive. Nothing in any of those opinions suggests that picketing which constitutes the noncoercive expression of views, argument or opinion is beyond the protection of the First Amendment.

Conclusion.

For the foregoing reasons we submit that this Court should hold that the unfair labor practices found in these cases do not affect commerce within the meaning of Sections 2 (6) and (7) of the Act, that a union does not violate Section 8 (b) (4) (A) by inducing or encouraging employees not to work on the same job with nonunion employees and that picketing which constitutes a noncoercive expression of views does not violate the Act.

Respectfully submitted,

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